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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN DAVIS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Congress enacted, and President Bush signed into law, the OPEN Government Act of 2007 while this case was in the district court on remand from the court of appeals. The OPEN Government Act of 2007 clarified that the "catalyst theory" for the award of attorney's fees applies in Freedom of Information Act cases. In doing so, the Act overturned the majority decision of the court of appeals for the District of Columbia circuit in *Oil, Chem. & Atomic Workers Intl. Union, AFL-CIO* v. *Dept. of Energy ("OCAW")*, 288 F.3d 452 (D.C.Cir. 2002). The *OCAW* decision had extended the holding of this Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) to Freedom of Information Act cases.

1. Whether the OPEN Government Act of 2007 provision restoring the "catalyst theory" for eligibility for an award of attorney's fees in Freedom of Information Act cases provides the basis for an award of fees in a case that was pending in the district court when that Act became effective.

2. Whether the court of appeals decision below is in conflict with the holding of this Court in *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974) on the question of applying the newly enacted attorney's fee provision of the OPEN Government Act of 2007.

QUESTIONS PRESENTED FOR REVIEW – Continued

3. Whether the court of appeals decision below is in conflict with the holding of this Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) in this case where Petitioner had successfully pursued appeals and district court proceedings and obtained release of 158 of 163 responsive requested audio tapes.

LIST OF ALL PARTIES

The parties to this case in the United States Court of Appeals for the District of Columbia Circuit were John Davis, Appellant and United States Department of Justice, Appellee.

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CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BELOW

The opinions and orders entered below are the orders denying Mr. Davis' timely filed petition for rehearing and petition for rehearing en banc dated August 26, 2010, App. 75, 77; the opinion of the U.S. Court of Appeals for the District of Columbia Circuit decided July 6, 2010, published as *Davis* v. *U.S. Dept. of Justice ("Davis V")*, 610 F.3d 750 (D.C.Cir. 2010), App. 1, affirming the decision of the district court entered March 24, 2009, published as *Davis* v. *Dept. of Justice*, 606 F.Supp.2d 1 (D.D.C. 2009), App. 14; the report and recommendation of the magistrate dated April 29, 2008, App. 22. This case was the subject of prior opinions of the court of appeals, *Davis* v. *DOJ ("Davis IV")*, 460 F.3d 92 (D.C.Cir. 2006), App. 42, in part, reversing and remanding pursuant to Davis' appeal; *Davis* v. *DOJ ("Davis III")*, 2001 WL 1488882 (D.C.Cir. October 17, 2001), granting Davis' motion for summary reversal, App. 71; *Davis v. DOJ ("Davis II")*, 1998 WL 545422 (D.C.Cir. July 31, 1998), remanding case for further proceedings in Davis' favor, App. 73; *Davis* v. *DOJ ("Davis I")*, 968 F.2d 1276 (D.C.Cir. 1992).

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) to review the Judgment of the United States Court of Appeals for

the District of Columbia Circuit entered July 6, 2010 in No. 09-5189, App. 1, 12. Timely filed petitions for rehearing and rehearing en banc of the Judgment were denied by the court of appeals by orders dated August 26, 2010. App. 75, 77.

STATUTORY PROVISIONS

Petitioner Davis sets forth below the pertinent provisions of statutes that are applicable to determination of this appeal.

(1) The following parts of the OPEN Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525, signed into law by President George W. Bush on December 31, 2007, are applicable:

> **SEC. 2. FINDINGS**
>
> Congress finds that –
>
> (1) The Freedom of Information Act was signed into law on July 4, 1966, because the American people believe that –
>
> (A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;
>
> (B) such consent is not meaningful unless it is informed consent; and

(C) as Justice Black noted in his concurring opinion in Barr v. Mateo (360 U.S. 564 (1959)), "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees",

(2) the American people firmly believe that our system of government must itself be governed by a presumption of openness;

(3) the Freedom of Information Act establishes a "strong presumption in favor of disclosure" as noted by the United States Supreme Court in United States Department of State v. Ray (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act;

(4) "disclosure, not secrecy, is the dominant objective of the Act" as noted by the United States Supreme Court in Department of Air Force v. Rose (425 U.S. 352 (1976));

(5) in practice, the Freedom of Information Act has not always lived up to the ideals of that Act; and

(6) Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the Government remains open and accessible to the American people and is always based not upon the "need to know" but upon the fundamental "right to know."

* * *

SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION COSTS.

(a) IN GENERAL. – Section 552(a)(4)(E) of title 5, United States Code, is amended –

(1) by inserting "(i)" after "(E)"; and

(2) by inserting at the end of the following:

"(ii) For the purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either –

"(I) a judicial order, or an enforceable written agreement or consent decree; or

"(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.".

(b) LIMITATION. – Notwithstanding section 1304 of title 31, United States Code, no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay the costs resulting from fees assessed under section 552(a)(4)(E) of title 5, United States Code. Any such amounts shall be paid only from the funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.

* * *

(2) The following portion of the Freedom of Information Act, Title 5 United States Code Section 552, as amended, is applicable to this petition:

(a)(4)(E)(i) The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either –

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

STATEMENT OF THE CASE

On December 31, 2007 President George W. Bush signed into law the OPEN Government Act of 2007, while Petitioner Davis' case was pending on remand in the district court.[1] That Act contained a provision to define the term "substantially prevailed" in the attorney's fee provision of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E). Congress enacted the OPEN Government Act of 2007 attorney's fee provision to clarify that the "catalyst theory" of eligibility for attorney's fees and costs applies in FOIA cases. *Senate Judiciary Committee Report to Accompany S. 849*, April 30, 2007, page 4. This case

[1] The Act may be cited as the Openness Promotes Effectiveness in our National Government Act of 2007, or the OPEN Government Act of 2007. Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525.

presents the question of the application of the new statutory provision to cases pending when it was enacted.

After the effective date of the OPEN Government Act of 2007, Petitioner Davis filed a motion for an award of fees and costs in the district court citing the new provision. Petitioner's motion was referred by the district judge to a United States magistrate judge for report and recommendation. The magistrate judge recommended that Petitioner be found both eligible for and entitled to attorney's fees and costs under the amended 5 U.S.C. § 552(A)(4)(E). The magistrate judge recommended that Petitioner be awarded $112,029.48, consisting of $111,717.50 in attorney's fees and $311.98 in costs. *Report and Recommendation of Magistrate*, Civil No. 88-0130, Dkt. 276 (D.D.C. April 29, 2008), App. 22.

The Department of Justice ("DOJ") objected to the magistrate judge's report and recommendation, and the district court upheld the objection and denied Petitioner's motion for an award of attorney's fees. Petitioner Davis appealed, and the court of appeals affirmed the district court's denial of Davis' motion for an award of attorney's fees. *Davis* v. *Dept. of Justice ("Davis V")*, 610 F.3d 750 (D.C.Cir. 2010), App. 1. Petitioner Davis timely filed a petition for rehearing and suggestion of rehearing en banc with the court of appeals, and the petitions were both denied on August 26, 2010. App. 75, 77. Davis now petitions this court to hear his appeal of the court of appeals

decision in *Davis V* to affirm denial of his most recent motion for an award of attorney's fees.

A review of the procedural history of the case demonstrates that the magistrate judge's recommendation of an award of fees and costs was proper and should be reinstated. App. 22. In 1986 Petitioner John Davis filed a Freedom of Information Act request with the United States Department of Justice seeking access to audio tape recordings that had been played in open court during the criminal trial of convicted New Orleans organized crime leader Carlos Marcello.[2] The audio tapes in question had been made during an FBI investigation of Carlos Marcello that resulted in the criminal trial. When the Department of Justice failed to release the tapes in response to his request, Petitioner Davis filed suit under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), in the United States District Court for the District of Columbia, seeking release of the tapes without charge for search or duplication fees. The district court ordered the FBI to release the tapes, reasoning that the tape recordings had been played in open court during the trial and were thus public records that could not be withheld under FOIA. The Department of Justice appealed, and the court of appeals reversed and remanded, ruling that plaintiff Davis had the

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[2] Petitioner Davis is the author of eleven books on varied subjects, including *Mafia Kingfish: Carlos Marcello and the Assassination of John F. Kennedy*, McGraw-Hill Publishing Company, New York (1989).

burden of demonstrating which tapes had actually been played at the trial, and that Davis should have an opportunity to satisfy this burden in further proceedings in district court. *Davis* v. *Dept. of Justice ("Davis I")*, 968 F. 2d 1276, 1282 (D.C.Cir. 1992).

In compliance with the court of appeals ruling, in remand proceedings before the district court, Petitioner Davis produced docket entries and transcripts showing which tapes were introduced at the Marcello trial. In response to Davis' production in the remand proceedings, in 1993 the FBI released to Petitioner Davis 157 of 163 tapes responsive to his initial FOIA request, without charge for search or duplication fees, and stated that an additional tape would have been released but that it could not be located. Despite the fact that the tapes had been played in open court in the Marcello trial, the FBI continued to withhold the remaining five tapes on the basis of Exemption 7(C) of the FOIA which permits an agency to withhold records "compiled for law enforcement purposes" if their release "could be reasonably expected to constitute an unwarranted invasion of personal privacy." The district court sustained the withholdings, and Davis appealed.

On this second appeal, the court of appeals remanded the case "to determine whether any of the five tapes withheld in their entirety contains material that can be segregated and disclosed without unwarrantably impinging on anyone's privacy." *Davis* v. *Dept. of Justice ("Davis II")*, 1998 WL 545422 (D.C.Cir.), App. 73. On remand, in 1999 the FBI

released to Davis, without charge for search or duplication fees, one of the five tapes because the speaker on the tape had died. The FBI continued to withhold the other four tapes in their entirety because the FBI could not determine whether the speakers were alive. The district court then held, on the basis of an affidavit submitted by the FBI, that the FBI had made adequate efforts to determine whether the speakers were alive or dead.

Petitioner Davis appealed again, and the court of appeals granted Davis' motion for summary reversal, holding that the FBI affidavit was "insufficient to determine the extent of the Bureau's efforts to ascertain whether the putative beneficiaries of Exemption 7(C) are alive or dead." *Davis* v. *Dept. of Justice ("Davis III")*, 2001 WL 1488882, at 1 (D.C.Cir. October 17, 2001), App. 71. The court of appeals remanded the case so that the FBI could document what sources it consulted and so that the district court could decide in the first instance whether the government "did all it should have done" and whether the information should be withheld. On remand the district court ultimately granted summary judgment in favor of the FBI and dismissed Petitioner Davis' complaint.

Petitioner Davis appealed again, challenging the district court's grant of summary judgment and an earlier order from the district court denying Davis' motion for an award of attorney's fees. The court of appeals reversed the district court's grant of summary judgment and "remanded with directions that the FBI evaluate alternative methods for determining

whether the speakers on the requested audiotapes are dead, and that thereafter the district court determine whether the FBI's chosen course is reasonable." *Davis* v. *Dept. of Justice ("Davis IV")*, 460 F.3d 92, 106 (D.C.Cir. 2006), App. 42. The court of appeals also affirmed the district court's denial of attorney's fees, and Davis' petition for *certiorari* on the attorney's fees issue was not granted. 551 U.S. 1144 (2007). Subsequently, the district court found that the FBI's search was reasonable and accordingly again granted summary judgment for the FBI. Petitioner Davis filed his second motion for award of attorney's fees in light of enactment of the OPEN Government Act of 2007 during the pendency of the district court remand proceedings, and he appealed the summary judgment decision.

As noted, Petitioner's second motion for an award of attorney's fees was referred to a United States magistrate judge for report and recommendation, and the magistrate judge recommended that Petitioner be found both eligible for and entitled to attorney's fees and costs under the amended 5 U.S.C. § 552(A)(4)(E). App. 22. The Department of Justice objected to the magistrate judge's report and recommendation, and the district court upheld the objection and denied Petitioner's second motion for an award of attorney's fees. Petitioner Davis appealed, and the court of appeals affirmed the district court's denial of Davis' second motion for an award of attorney's fees. *Davis* v. *Dept. of Justice ("Davis V")*, 610 F.3d 750 (D.C.Cir. 2010), App. 1. Petitioner Davis timely filed a

petition for rehearing and suggestion of rehearing en banc with the court of appeals, and the petitions were both denied on August 26, 2010. App. 75, 77. Davis now petitions this Court to hear his appeal of the court of appeals decision in *Davis V* to affirm denial of his second motion for an award of attorney's fees.

ARGUMENT

I. The newly enacted attorney's fee provision of the OPEN Government Act of 2007 expressly applies in any case, pending or prospective, under the Freedom of Information Act.

In this matter, Congress enacted and President Bush signed into law the OPEN Government Act of 2007 while this case was in the district court on remand from the court of appeals. The OPEN Government Act of 2007 clarified that the "catalyst theory" for the award of attorney's fees applies in Freedom of Information Act cases. In doing so the Act overturned the majority decision of the court of appeals for the District of Columbia circuit in *Oil, Chem. & Atomic Workers Intl. Union, AFL-CIO* v. *Dept. of Energy ("OCAW")*, 288 F.3d 452 (D.C.Cir. 2002). The *OCAW* decision had applied the holding of this Court in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health and Human*

Resources, 532 U.S. 598 (2001) to Freedom of Information Act cases.[3]

Congress' restoration of the catalyst theory for eligibility for an award of fees in Freedom of Information Act cases, and the issue of application of the amendment to pending FOIA cases, are important questions of federal law. Congress in the OPEN Government Act of 2007 described the Freedom of Information Act as being central to the operation of our democratic form of government. *Section 2, Findings of the OPEN Government Act of 2007*, statutory provisions. Congress recited in the Act that this Court has repeatedly recognized the importance of the Freedom of Information Act to the proper functioning of our free democratic government, and that openness is the dominant purpose of the FOIA.

In addition, upon taking office, President Barack Obama issued a memorandum for heads of all federal departments and agencies on January 21, 2009 stating in part that "(in) our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government." The FOIA

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[3] Judge Rogers dissented in *OCAW*, pointing out that *Buckhannon* required a judicially sanctioned alteration of the legal relationship of the parties to establish eligibility for a fee award, and that this test could be met in a variety of fact patterns in the course of FOIA litigation. The dissent argued that the test had been met in that case.

attorney's fee provision is an enforcement mechanism to facilitate public access to information under that Act. Thus the issues of application of the OPEN Government Act of 2007 to pending FOIA cases, and the conflicts between the court of appeals decision and this Court's prior holdings set forth herein are likewise important questions of federal law.

As an initial matter, in considering the question of application of a newly enacted statutory provision to pending cases, this Court has said that a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994). Such express direction of reach does appear in the text of the amended statute in this case. The text of the FOIA attorney's fee provision, 5 U.S.C. § 552(a)(4)(E)(i), as amended, states that "(t)he Court may assess against the United States reasonable attorney's fees and other litigation costs reasonably incurred **in any case** under this section in which the complainant has substantially prevailed" (emphasis added), and then defines "substantially prevailed" in terms of the catalyst theory.[4]

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[4] The text of the catalyst theory portion of the amendment reads, "For the purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either –

(I) a judicial order, or an enforceable written agreement or consent decree; or

(Continued on following page)

Petitioner Davis seeks relief based on this express statutory language providing that the Court may assess fees in any case under the FOIA in which complainant has substantially prevailed under the restored catalyst theory. The language "in any case" by plain meaning applies to pending as well as prospective cases, and Petitioner's case was a pending case, and thus falls within the definition of any case under the FOIA.[5] The court of appeals below did not discuss this express statutory language in refusing to affirm the magistrate judge's recommendation of an award of fees. The court of appeals decision below is an error in interpreting this amended statute and must be corrected.

Further evidence of Congressional intent is found in the U.S. Senate Committee on the Judiciary Report on the OPEN Government Act of 2007, which states, in explaining provisions of the Act, that "(t)he bill clarifies that Buckhannon does not apply to FOIA cases." *Senate Judiciary Committee Report to Accompany S. 849*, April 30, 2007, page 4. Yet despite this

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(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."

[5] This interpretation of the cited statutory language from the FOIA attorney fee provision is consistent with the D.C. Circuit's holding in *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1367 (D.C.Cir. 1977), *overruled on other grounds by Burka* v. *Dept. of Health and Human Services*, 142 F.3d 1286 (D.C.Cir. 1998). *Cuneo* held that the FOIA attorney fee provision applied to cases pending when it was adopted in 1974.

express intent that *Buckhannon* not apply to FOIA cases, the court of appeals in its decision below applied the *Buckhannon* decision to FOIA cases even after the effective date of the OPEN Government Act amendment. The court of appeals wrote that as a court analyzes eligibility for an award, the 2001 *Buckhannon* decision controls the meaning of the FOIA attorney's fees provision from the time it was first enacted in 1974 until the OPEN Government Act amendment in 2007. App. 8. This construction by the court of appeals continues to apply the *Buckhannon* decision in FOIA cases for the period of time from 1974 to the enactment of the OPEN Government Act of 2007 and is contrary to Congress' expressed intent that "Buckhannon does not apply to FOIA cases." This is especially so in light of the cited language in the statute that applies the restored catalyst theory to "any case" under the FOIA.

The FOIA attorney's fee statute, as amended by the OPEN Government Act of 2007, expressly applies to any case under the section, including pending cases, and the court of appeals was in error in interpreting this statute when it refused to affirm the magistrate judge's application of the provision in recommending an award of Petitioner's fees and costs.

II. In *Davis V* the court of appeals did not follow the holding of this Court in *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974) on the important question of applying the newly enacted attorney's fee provision of the OPEN Government Act of 2007.

In *Bradley* v. *School Board of Richmond*, 416 U.S. 696 (1974) this Court held that a court is to apply the law in effect at the time of its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. The *Bradley* case was a long pending case involving application of a statute authorizing an award of attorney's fees enacted during the pendency of the case, which is the same fact pattern as in this matter.[6] The decision of the court of appeals below is in conflict with the *Bradley* holding.

The United States magistrate judge properly relied on the *Bradley* holding in applying the provisions of the OPEN Government Act of 2007 to recommend that Petitioner be awarded attorney's fees and costs in this case. App. 22. The magistrate

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[6] The court of appeals for the D.C. Circuit followed *Bradley* by holding that the attorney's fee provision of the Freedom of Information Act adopted by amendment in 1974 applied to cases pending when that statutory amendment became effective. *Cuneo* v. *Rumsfeld*, 553 F.2d 1360, 1367 (D.C.Cir. 1977), *overruled on other grounds by Burka* v. *Dept. of Health and Human Services*, 142 F.3d 1286 (D.C.Cir. 1998). Thus, the D.C. Circuit's holdings on this point are themselves in conflict.

judge correctly noted that this Court has favorably distinguished cases such as this one and *Bradley,* which involve attorney's fee awards, as not subject to the usual presumption against retroactive effect of newly enacted statutes. Magistrate's Report, citing *Landgraf* v. *USI Film Products*, 511 U.S. 244, 277 (1994). In explaining this distinction, this Court observed that attorney's fee determinations are "collateral to the main cause of action" and "uniquely separable from the main cause of action to be proved at trial." *Id.* at 277.

In *Davis V*, the court of appeals tried to justify its failure to follow *Bradley*'s holding by attempting to distinguish the instant case. The court of appeals stated that the extent of the change in the law was negligible in *Bradley* because the plaintiffs were eligible for an award of attorney's fees prior to the enactment of the statute. However, in this case as in *Bradley*, Petitioner Davis was likewise eligible for an award of fees before enactment of the OPEN Government Act of 2007 provision. The government's release of 158 audio tapes in this case occurred in 1993 and 1999, before the *Buckhannon* decision in 2001 or the *OCAW* decision of 2002 overturned the catalyst theory in effect in the D.C. Circuit. Thus the Department of Justice made its decision to release the 158 tapes in this case at a time when it would have anticipated that it could be found liable to pay Davis' attorney's fees under the catalyst theory, which was the case law in effect at that time.

DOJ suffers no unanticipated surprise in facing a fee award now, nor has its liability been increased, because it released the 158 tapes pre-*Buckhannon* at a time when the catalyst theory was the law. To be clear, applying the catalyst theory does no injury to DOJ's expectations on the facts of this case, nor does it impose new liability or new duties over those that existed when DOJ acted. And further, a proper analysis of the record of this case demonstrates that in any event Petitioner Davis would have been eligible for an award of attorney's fees under the *Buckhannon* standard were it to apply, as set forth in the following argument section **III.** below.

Finally, in *Bradley* the legal basis for prior eligibility for an award was found in the general equitable powers of the Court, rather than in a statute. *Bradley* at 706. These general equitable powers of the court to award attorney's fees exist in this case, as they did in *Bradley*. *See Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 45 (1991); *Cuneo*, 553 F.2d at 1367 ("A successful FOIA complainant also has rendered substantial service to both the government by bringing it into compliance with the policy underlying the FOIA, and to the public at large by securing for it the benefits assumed to flow from public disclosure of government information.").

The attempt by the court of appeals opinion to distinguish *Bradley* fails because in this case, as in *Bradley,* Petitioner was eligible for an award of fees prior to enactment of the OPEN Government Act under the catalyst theory case law in effect at the

time, under a proper application of the *Buckhannon* test were it to apply, or under the equitable powers of the court.

The court of appeals in *Davis V* points to this Court's decision in *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298 (1994) as supporting its analysis, however this reliance is misplaced. The *Rivers* decision involved a substantive provision of the Civil Rights Act of 1991 imposing liability for violations of that Act in the process of contracting and benefits of the contractual relationship. *Rivers* did not involve a provision for award of attorney's fees and costs as had *Bradley*, and thus did not overturn the *Bradley* holding applying to attorney's fee statutes. As this Court stated in the later *Landgraf* decision, attorney's fee determinations are collateral to the main cause of action and uniquely separable from the main cause of action, and thus are subject to a different standard. 511 U.S. at 277.

This case should follow the *Bradley* holding because there was a pre-existing basis for the award of fees at the time of the defendant's conduct resulting in liability for fees. The court of appeals incorrectly analyzed this element of the case and its error in interpreting the law conflicts with this Court's ruling in *Bradley*. The recommendation of the magistrate judge should be reinstated.

III. The court of appeals misinterpreted this Court's holding in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) in this case to deny an award of attorney's fees.

As argued above, in *Davis V* the court of appeals applied the *Buckhannon* case holding to the entire period from 1974 to enactment of the OPEN Government Act of 2007. App. 8. Petitioner believes the court of appeals was in error to apply the *Buckhannon* precedent in this case after the date of enactment of the OPEN Government Act. Alternatively, Petitioner calls to the attention of this Court that the court of appeals in relying on *Buckhannon* incorrectly interpreted the holding of that case to deny Petitioner Davis' eligibility for an award of fees, and the court of appeals decision is in conflict with *Buckhannon*.

The majority holding of *Buckhannon* stands for the proposition that to be eligible for fees Plaintiff must have obtained some judicially sanctioned material alteration of the legal relationship of the parties at the trial court or on appeal. *Id.* at 604-05. Justice Ginsburg, joined by three other members of this Court, wrote a dissenting opinion in *Buckhannon*. The dissent foresaw the issues that would arise in applying the holding to the progress of litigation in the lower courts. 532 U.S. at 633. These issues are fully presented in the complex procedural

history of this FOIA case in which Petitioner was successful in obtaining most of the requested tapes.

As is evident from the several judicial decisions rendered in this case, Petitioner Davis repeatedly obtained judicially sanctioned material alterations of the legal relationship of the parties. Initially, Davis won an order by the district court for release of the requested audio tapes, followed by an appeal by the government resulting in the decision in *Davis I*. In that opinion the court of appeals reversed and modified the district court's order, and set out the terms under which Davis could obtain release of the tapes by producing evidence that they had been played in open court in the Marcello trial. The court of appeals stated that Davis should have an opportunity to satisfy this burden in further proceedings in district court. *Davis* v. *Dept. of Justice ("Davis I")*, 968 F.2d 1276, 1282 (D.C.Cir. 1992).

On remand to the district court in proceedings before the district court, Davis met the burden of production established by the court of appeals, and obtained release by the FBI in 1993 of 157 of the 163 responsive tapes, without charge for search or duplication fees. Thus in *Davis I*, Davis obtained relief on the merits of his claim in remand proceedings instructed by the court of appeals. He won release of 157 of 163 requested tapes without charge for search or duplication fees as a result of meeting the test set forth in the judicial ruling by the court of appeals. The appellate ruling materially altered the legal relationship of the parties by setting forth what the

law required Petitioner to do to obtain release of the tapes, and he met the test in district court. To argue that this is not a judicially sanctioned material alteration of the legal relationship of the parties ignores appellate practice in which courts at times issue decisions which are discussions of law and offer guidance to the lower courts and to the larger public.

Further, Petitioner sought relief in his amended complaint in the form of release of records without charge for search or duplication fees, and it follows that release to him of the requested records without charge is also relief on the merits of Petitioner's claim. The *Davis I* appellate decision resulted in Davis obtaining release of 157 of 163 audio tapes without charge in remand proceedings in the district court instructed by the court of appeals. Petitioner's success in obtaining release of the 157 tapes without charge in the remand proceedings meets the *Buckhannon* test of eligibility for an award of fees and costs.

In addition, Davis won reversals and remands in three decisions by the court of appeals, *Davis II, III* and *IV.* In *Davis II*, the court of appeals remanded the case for review of five withheld tapes to see if any material could be segregated and disclosed without unwarrantably impinging upon anyone's privacy. Upon remand the FBI in 1999 released one of the withheld tapes after determining that the speaker on the tape had died. Again, no search or duplication fees were charged to Davis. *Davis II* also

was a judicial material alteration of the legal relationship of the parties in the form of a remand to see if any additional information could be disclosed, and as a direct consequence of the court's actions, Davis received release of the 158th tape out of 163 deemed responsive, without charge for search or duplication fees. The *Buckhannon* test is also met on these facts.

And the court of appeals in *Davis III* and *IV* reversed summary judgment and remanded the case for further consideration consistent with its opinions. There can be little doubt that reversal of summary judgment and remand for further proceedings is a material alteration of the legal relationship of the parties.

This Court noted in *Buckhannon* that the degree of success of the plaintiff required for eligibility is not fixed; rather the plaintiff is required to obtain some relief on the merits of his claim, and that even an award of nominal damages suffices under this test. *Buckhannon* at 603-04. Petitioner more than meets that test on the facts of this case.

In sum, Petitioner Davis won release of 158 of 163 audio tapes in remand proceedings instructed by the court of appeals, without charge for search or duplication fees, and he won three reversals of summary judgment, followed by remands. Contrary to the erroneous interpretation of the court of appeals, Petitioner Davis meets this Court's "some relief on the merits of his claim" test of *Buckhannon* to be eligible for an award of fees, even though Petitioner

believes the OPEN Government Act of 2007 attorney's fee provision properly applies in this case. As a result Petitioner Davis is eligible for an award of fees and costs, and the recommendation of the magistrate awarding fees and costs should be reinstated.

CONCLUSION

For these reasons the petition for *certiorari* should be granted. Petitioner Davis seeks relief from this Court to overturn the court of appeals decision affirming the district court's overruling of the report and recommendation of the United States magistrate judge in this case. Petitioner Davis prays this Court to reinstate the recommendation of the magistrate judge and order the award of attorney's fees and costs as set forth in the report and recommendation of the magistrate, and further that this Court remand the case to the district court to determine the amount of additional attorney's fees incurred for all compensable attorney's fee services not contained in the magistrate report, and for such further relief as this Court shall deem just.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 2010 Decided July 6, 2010

No. 09-5189

JOHN DAVIS,
APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:88-cv-00130-HHK)

James H. Lesar argued the cause and filed the briefs for appellant. *Daniel S. Alcorn* entered an appearance.

Jane M. Lyons, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Ronald C. Machen, Jr.,* U.S. Attorney, and *R. Craig Lawrence,* Assistant U.S. Attorney, *Heather Graham-Oliver,* Assistant U.S. Attorney, entered an appearance.

Before: HENDERSON, TATEL and GRIFFITH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge:* For forty-four years the Freedom of Information Act (FOIA) has facilitated public access to the records of federal agencies. *See* Pub. L. No. 89-554, § 552, 80 Stat. 378, 383 (1966) (codified as amended at 5 U.S.C. § 552 (Supp. III 2009)). This case has been pending for half that time. The appellant, John Davis, filed a FOIA request with the Department of Justice in 1986, seeking access to tape recordings made during an FBI investigation of a New Orleans mob boss. When the Department failed to produce the recordings, Davis filed this suit. The question in this appeal – his sixth by our count – is whether the OPEN Government Act of 2007, Pub. L. No. 110-175, § 4, 121 Stat. 2524, 2525, permits Davis to recoup the attorneys' fees he incurred during the protracted litigation that followed. It does not.

I.

There is no need to linger on the facts and procedural history of this case; we have unwound that yarn before. *See Davis v. DOJ (Davis IV)*, 460 F.3d 92 (D.C. Cir. 2006); *Davis v. DOJ (Davis I)*, 968 F.2d 1276 (D.C. Cir. 1992). The salient points are that the Department voluntarily released many of the requested tapes in 1995, one additional tape in 1999, but nothing more in the decade that followed. The district court granted summary judgment in favor of the Department in 2007, concluding that it had

fulfilled its obligations under FOIA. *Davis v. DOJ*, No. 88-00130, 2007 WL 4275512 (D.D.C. Dec. 3, 2007), *aff'd*, No. 08-5024, Order at 1 (D.C. Cir. July 31, 2008). Davis then moved for attorneys' fees.

Section 552(a)(4)(E) of Title 5 makes plaintiffs who have "substantially prevailed" in FOIA litigation eligible for a recovery of reasonable attorneys' fees. At one time, lower courts held that FOIA plaintiffs were eligible for a fee award if the lawsuit substantially caused the agency to release the requested records. Our circuit's interpretation of § 552(a)(4)(E) reflected this approach – known as the "catalyst theory" – when the Department handed its tape recordings over to Davis in 1995 and 1999. *See, e.g., Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364-65 (D.C. Cir. 1977).

But the Supreme Court rejected the catalyst theory in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). Construing two statutes allowing courts to award attorneys' fees to the "prevailing party," the Court held that a plaintiff whose lawsuit prompts the defendant to voluntarily change its conduct does not qualify for a fee award. *See id.* at 600-01. We subsequently concluded that "the existing law of our circuit must give way" to *Buckhannon* and held that a FOIA plaintiff has "substantially prevailed" only if he has "'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered consent decree." *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*

(OCAW), 288 F.3d 452, 456-57 (D.C. Cir. 2002) (quoting *Buckhannon*, 532 U.S. at 603).

Disapproving of the effect these cases had on the disclosure policies of administrative agencies, Congress enacted the OPEN Government Act of 2007 to establish that the catalyst theory applied in FOIA cases. *See Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 370 (D.C. Cir. 2008). Under the new statute, a plaintiff "substantially prevail[s]" (and is thus eligible for a fee award) if his suit yields relief in the form of "a judicial order, or an enforceable written agreement or consent decree" or "a voluntary or unilateral change in position by the agency." 5 U.S.C. § 552(a)(4)(E)(ii) (Supp. III 2009) [hereinafter 2007 Act].

Prior to the 2007 Act, we determined in *Davis IV* that Davis was ineligible for attorneys' fees under *Buckhannon* and *OCAW*. 460 F.3d at 105-06. We remanded for further proceedings on the merits, and Davis renewed his fee request in light of the 2007 Act. A magistrate judge agreed with Davis that the new statute governed his request for attorneys' fees and recommended an award of $112,029.48. The district court disagreed and denied Davis's motion. We affirm.

II.

Whether Davis is now eligible for attorneys' fees is a question of legislative retroactivity: Does the 2007 Act resurrect the catalyst theory for cases in which the agency voluntarily changed its position before the statute's enactment? A statute operates

retroactively if it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). There is a "well-settled presumption" against giving statutes retroactive effect. *Id.* at 277. *See generally Kaiser Aluminum & Chem. Corp. v. Bonjorno,* 494 U.S. 827, 840-58 (1990) (Scalia, J., concurring) (tracing the historical development of the presumption); DANIEL E. TROY, RETROACTIVE LEGISLATION 25-43 (1998) (same). The presumption prohibits courts from applying a new provision in a way that would "'affect[ ] substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment,'" *Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 37 (2006) (quoting *Landgraf,* 511 U.S. at 278), "unless Congress has clearly manifested its intent to the contrary," *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 946 (1997).

Summers v. Department of Justice, 569 F.3d 500 (D.C. Cir. 2009), largely determined the temporal scope of the 2007 Act. *Summers* involved a request for attorneys' fees in a FOIA lawsuit that was settled in 2005, after *OCAW* but before the 2007 Act. *See id.* at 502. The district court held the plaintiff ineligible for a fee award under *OCAW*. *Id.* The 2007 Act took effect while the appeal was pending, and the plaintiff asked us to apply the new statute. *See id.* at 503-04. The *Summers* court observed that because the government had voluntarily relinquished the records, it was not liable for attorneys' fees "under the pre-amendment rule of *Buckhannon*." *Id.* at 503. Applying the new

law would therefore "impose an 'unforeseeable obligation' upon the defendant by exposing it to liability for attorneys' fees for which it clearly was not liable before." *Id.* at 504 (quoting *Landgraf*, 511 U.S. at 278). Moreover, the court found that the text of the 2007 Act was "silent with regard to its temporal reach," and that its legislative history contained "no evidence of a 'clear congressional intent favoring [retroactive application].'" *Id.* (quoting *Landgraf*, 511 U.S. at 280). Absent clear instructions from Congress, the *Summers* court declined to apply the 2007 Act retroactively.

Davis contends *Summers* was wrongly decided. *Summers*, of course, is the law of the circuit, and "[o]ne three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry,* 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc); *see also Davis IV.* 460 F.3d at 106. Davis's arguments that *Summers* is not binding are without merit. Accordingly, we turn to his two attempts to distinguish the case.

First, Davis argues that the 2007 Act would not operate retroactively here because the statute simply reinstates the standard this court applied when the Department voluntarily released the tapes in 1995 and 1999. The government could not foresee its potential liability for fees in *Summers* because it settled the case after *Buckhannon* and *OCAW* By contrast, when the government disclosed the tapes in this case, it could expect to pay attorneys' fees under the catalyst theory. At least in these circumstances,

Davis contends, the 2007 Act *restores* but does not "'*increase* a party's liability for past conduct,'" *Summers*, 569 F.3d at 504 (quoting *Landgraf*, 511 U.S. at 280) (emphasis added), and therefore is not impermissibly retroactive.

The Supreme Court recognized the "equitable appeal" of this line of argument in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 310 (1994), but ultimately rejected it. At issue in *Rivers*, the companion case to *Landgraf*, was a provision of the Civil Rights Act of 1991 that "overruled" the Supreme Court's holding in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that 42 U.S.C. § 1981 did not provide a cause of action for discriminatory termination. *See Rivers*, 511 U.S. at 304-05, 306-07. The plaintiffs in *Rivers* were fired before the Court decided *Patterson*, at a time when circuit precedent would have allowed their claims to go forward. *See id.* at 309 n.9. But when the plaintiffs invoked the 1991 Act on appeal, the Court rejected their argument "that restorative statutes do not implicate fairness concerns relating to retroactivity . . . when . . . the new statute simply enacts a rule that the parties believed to be the law when they acted." *Id.* at 309; *see id.* at 309-13. "Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions," the Court explained, "its intent to reach conduct preceding the 'corrective' amendment must clearly appear." *Id.* at 313.

Rivers forecloses Davis's argument. It does not matter that Davis "substantially prevailed *prior* to this Court's decision in *[OCAW]*." Appellant's Br. at 2. Although our pre-*OCAW* decisions endorsed the catalyst theory for attorneys' fees under FOIA, the Supreme Court in *Buckhannon* made clear that our circuit and others had gotten it wrong. *OCAW*, 288 F.3d at 454-57; *accord Zarcon, Inc. v. NLRB*, 578 F.3d 892, 894-95 (8th Cir. 2009); *Or. Nat'l Desert Ass'n v. Locke*, 572 F.3d 610, 617-18 (9th Cir. 2009); *Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. INS*, 336 F.3d 200, 203-07 (2d Cir. 2003). *Buckhannon*, moreover, did not apply only to future conduct. While legislation is presumptively prospective, judicial decisions are typically retrospective. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."); *see, e.g., Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94-99 (1993); *INS v. St. Cyr*, 533 U.S. 289, 316-17 (2001). Because "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the [court's] decision," *Rivers*, 511 U.S. at 312-13, "*Buckhannon* controls" the meaning of the FOIA attorneys' fees provision from the time of the statute's enactment until its amendment in 2007, *OCAW*, 288 F.3d at 457. Therefore, in "ask[ing] whether the new provision attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 269-70, we must measure the 2007 Act against our post-*Buckhannon* interpretation of the statute and

not the decisions that came before. *See Rivers*, 511 U.S. at 313 (explaining that *Patterson*, rather than earlier circuit precedent, "provides the baseline for [the Court's] conclusion that the [new statute] would be 'retroactive' if applied to cases arising before [the statute's effective] date"); *see also AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1971 n.5 (2009). Prior to the 2007 Act, the legal consequences of the Department's voluntary release of the tapes – as determined by *Buckhannon* and *OCAW* – did not include liability for attorneys' fees. *See Davis IV*. 460 F.3d at 105-06. Because reliance on the 2007 Act would give rise to liability for attorneys' fees where none existed before, *Summers* precludes its application.

Davis's second effort to distinguish *Summers* rests on the fact that the magistrate judge in this case found that Davis was entitled to attorneys' fees. He notes that in *Summers* "there [was] no indication the district court would have awarded fees had it the statutory authority or equitable power to do so." 569 F.3d at 504. Davis lifts the *Summers* court's language out of context. In making this observation, the court was distinguishing *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), and the passage can be understood only against that backdrop.

The plaintiffs in *Bradley* were a group of parents who brought a class action to desegregate the public schools in Richmond, Virginia. *Id.* at 699. After they prevailed in the district court, they were awarded attorneys' fees. *Id.* at 705-06. "Noting the absence at the time of any explicit statutory authorization for an

award of fees in school desegregation actions, the court based the award on two alternative grounds rooted in its general equity power." *Id.* at 706 (internal citation omitted); *see also id.* at 705-10. While the appeal was pending, Congress enacted the Emergency School Aid Act, Pub. L. No. 92-318, § 718, 86 Stat. 235, 369 (1972), which expressly authorized such fee awards. Holding that the new statute governed and lacked retroactive effect under these circumstances, the *Bradley* Court explained that the statute did "not impose an additional or unforeseeable obligation" on the school board because the board had acted "with the knowledge that, under different theories, . . . [it] could have been required to pay attorneys' fees." *Bradley*, 416 U.S. at 721. As the Supreme Court later explained, the statute at issue in *Bradley* did not have impermissible retroactive effects "[i]n light of the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing theories." *Landgraf*, 511 U.S. at 278; *see Martin v. Hadix*, 527 U.S. 343, 359-60 (1999).

What distinguishes *Bradley* – and by implication *Summers* – is the "prior availability" of attorneys' fees "under pre-existing theories." *Landgraf*, 511 U.S. at 278; *see Bradley*, 416 U.S. at 721. The statute at issue in *Bradley* did not operate retroactively because the "extent of the change in the law" was negligible. *Landgraf*, 511 U.S. at 270. Davis, unlike the *Bradley* plaintiffs, was not eligible for attorneys' fees before Congress enacted the relevant statute. *See Davis IV*, 460 F.3d at 105-06. Although the magistrate judge

found Davis entitled to a fee award, he did so only after applying the 2007 Act retroactively – wrongly as it turns out. He did not rely on any pre-existing authority. In any event, the magistrate's legal error has no bearing on our own retroactivity analysis.

III.

The decision of the district court is

Affirmed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5189 **September Term, 2009**
FILED ON: JULY 6, 2010

JOHN DAVIS,
APPELLANT

V.

UNITED STATES DEPARTMENT OF JUSTICE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:88-cv-00130-HHK)

Before: HENDERSON, TATEL and GRIFFITH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

Date: July 6, 2010

Opinion for the court filed by Circuit Judge Griffith.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DAVIS, **Plaintiff,** **v.** **DEPARTMENT OF JUSTICE,** **Defendant.**	**Civil Action 88-00130 (HHK)**

MEMORANDUM OPINION AND ORDER

(Filed Mar. 24, 2009)

Before the court is John Davis's motion for the attorney's fees and costs he has incurred in prosecuting this lawsuit brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.* [#266]. This motion was referred to Magistrate Judge Alan Kay for his report and recommendation pursuant to LCvR 72.3. The central question before the court is whether a statutory provision, enacted into law while this case was still pending, and authorizing the award of attorney's fees in situations like those presented in this case, operates retroactively. The Magistrate Judge concluded that it did and recommended that Davis's motion be granted. Report and Recommendation at 18 ("Rep. & Rec.") [#276]. The Department of Justice ("DOJ") objects to the Rep. & Rec., and argues that the statutory provision does not apply retroactively and that Davis cannot recover any

attorney's fees or costs. Upon consideration of Davis's motion, the DOJ's opposition, the Rep. & Rec., the DOJ's objection thereto, and Davis's response to the DOJ's objection, the court concludes that the DOJ's objection has merit, and that Davis's motion for attorney's fees and costs must be denied.

I. BACKGROUND

Davis brought this case under FOIA seeking audiotapes recorded during a criminal investigation from the Federal Bureau of Investigation ("FBI"). The facts and procedural history of the case are thoroughly described in the Magistrate Judge's Rep. & Rec. and will not be repeated here. The court will, however, give a brief explanation of the history of the attorney's fees dispute.

In 2000, Davis moved the court to award him attorney's fees and costs. This court denied the motion, holding that the Court of Appeals for the District of Columbia Circuit ("Court of Appeals") had foreclosed the award of attorney's fees in this case in *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy* ("*OCAW*"). Order, *Davis v. Dep't of Justice*, Civ. No. 88-130 (D.D.C. July 23, 2002) [#230]. *OCAW* held that to be eligible for an award of attorney's fees under FOIA, a plaintiff must have achieved relief as a result of a court judgment or court-ordered consent decree. *OCAW*, 288 F.3d 452, 456 (D.C. Cir. 2002). On appeal, the Court of Appeals upheld this court's order, citing *OCAW*. *Davis v. Dep't of Justice*,

460 F.3d 92, 105 (D.C. Cir. 2006). While Davis had received 158 tapes from the FBI, a considerable amount of relief, the Court of Appeals concluded that "none were produced as the result of a judgment on the merits or a court-ordered consent decree," and therefore Davis could not receive attorney's fees. *Id.* at 105-06 (internal quotations omitted). As it had in *OCAW*, the Court of Appeals rejected the proposition that Davis could be awarded attorney's fees under a "catalyst theory," i.e., that he could receive attorney's fees because the lawsuit brought about a voluntary change in the defendant's conduct. *See id.*

In 2007, Congress passed the Open Government Act of 2007, which amended the standard for determining whether a litigant is eligible for attorney's fees under FOIA. *See* 5 U.S.C. § 552(a)(4)(E). This new provision authorizes the award of attorney's fees in the case where "the complainant has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." *Id.* Congress thus codified the "catalyst theory" rejected in *OCAW* and *Davis*. Davis now seeks to revisit the issue of attorney's fees in light of this enactment.

II. ANALYSIS

The central question before the court is whether the provision of the Open Government Act of 2007, authorizing attorney's fees under the circumstances of this case, has retroactive effect and thus applies to

Davis's request for attorney's fees. In his Rep. & Rec., the Magistrate Judge concluded that the provision has retroactive effect and recommended that the court award Davis attorney's fees. Rep. & Rec. at 8, 14. The DOJ strongly objects to this conclusion and argues that principles of sovereign immunity bar the retroactive application of the attorney's fees provision. The DOJ is correct.

The Magistrate Judge's Rep. & Rec. acknowledged the traditional presumption against applying statutes retroactively, but cited to the Supreme Court's decisions in *Bradley* and *Landgraf* for the proposition that this presumption does not apply to attorney's fees. Rep. & Rec. at 6-8. In *Bradley*, the Supreme Court addressed whether plaintiffs in a desegregation action were entitled to attorney's fees when the statute authorizing those fees was enacted after the case was submitted to the appeals court. *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 698-99 (1974). The Court based its holding "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary," and determined that the attorney's fees provision was retroactive. *Id.* at 711. Two decades later, in *Landgraf* the Court recognized the tension between the traditional presumption against retroactivity and *Bradley,* but held that fee shifting statutes do not resemble the types of cases in which the traditional presumption against retroactivity has been invoked because

"[a]ttorney's fee determinations . . . are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." *Landgraf v. USI Film Prods.*, 511 U.S. 255, 277 (1994) (internal quotations omitted). The Magistrate Judge also cited *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367 (D.C. Cir. 1977), *overruled on other grounds*, which held that the FOIA provision authorizing attorney's fees enacted in 1974 could be applied to an action that was commenced in 1967 but terminated after the statute's effective date. Rep. & Rec. at 8. On the basis of these precedents, the Magistrate Judge concluded that attorney's fees provisions, such as the newly enacted FOIA provision, were retroactive and that Davis was eligible for attorney's fees. *Id.*

The DOJ objects to the Magistrate Judge's conclusion, arguing that applying the statute retroactively in this case is contrary to basic principles of sovereign immunity. Instead, the DOJ urges the court to apply the rule of strict construction under which any doubts about the scope of a waiver of sovereign immunity must be resolved in favor of the narrower governmental liability, and thus conclude that the provision is not retroactive. The DOJ cites *Brown*, in which the Court of Appeals concluded that an amendment to the Civil Rights Act allowing the recovery of interest on attorney's fees should not be applied retroactively because waivers of sovereign immunity are to be strictly construed. *See Brown v. Sec'y of Army*, 78 F.3d 645, 647 (D.C. Cir. 1996). The Court of Appeals in *Brown*, according to the DOJ,

distinguished *Bradley* because *Bradley* did not concern sovereign immunity. Davis rejoins that the DOJ's argument is undermined by *Cuneo,* in which the Court of Appeals applied attorney's fees amendments to FOIA retroactively. *Cuneo,* according to Davis, is clear and direct precedent that FOIA attorney's fees amendments waive sovereign immunity and apply retroactively. *Brown,* Davis argues, is of no assistance to the DOJ because the Civil Rights Act of 1991 amendments at issue in that case involved changes to the substantive law, such as providing for damages and jury trials, and not merely procedural matters.

The court concludes that *Brown* dictates the outcome in this case. In *Brown,* the Court of Appeals addressed head on the question of how to resolve the tension between (1) the *Bradley* rule that the court should apply the law in effect at the time it renders its decision and (2) the traditional presumption against retroactivity, in the case where the United States' sovereign immunity is at issue. *Brown,* 78 F.3d at 650-61 ("As they relate to the question of whether a statute is retroactive, then, it would seem that the *Bradley* presumption and the rule of strict construction are antipodal."). In that case, the question was whether an amendment to Title VII that allowed the award of interest on attorney's fees and costs was retroactive. *Id.* at 647. The Court of Appeals held that "[i]n the special case . . . in which the newly enacted statute is a wavier [sic] of sovereign immunity, the rule of strict construction requires . . . the

statute . . . to be construed no more broadly than is required by its terms." *Id.* at 651. The Court of Appeals distinguished *Bradley,* concluding that "[t]he statute at issue in *Bradley,* however, was not a waiver of the sovereign immunity of the United States. . . . As a result, the Supreme Court in *Bradley* had no occasion to advert to the special principle of statutory construction that it had previously made applicable to waivers of sovereign immunity." *Id.* at 649; *see also id.* at 651 ("*Bradley* was readily distinguishable: the United States was not the defendant in that case.") (internal quotation omitted). Thus, the Court of Appeals concluded that where the sovereign immunity of the United States is at issue, the rule of strict construction trumps the *Bradley* rule.

Davis argues that instead of *Brown,* the court should look to *Cuneo,* which held that a FOIA attorney's fee provision applied retroactively despite the fact that the United States was the defendant. The court acknowledges that the holding of *Cuneo* appears to be in tension with *Brown.* The Court of Appeals, however, distinguished *Cuneo* in *Brown,* explaining *Cuneo* as follows: the "legislative history showed that Congress intended that [the] existing body of law governing attorney's fees be used to determine whether [an] award could be made against [the] Government." *Id.* at 652. The court concludes that to the extent that *Cuneo* would lead it to reach a different holding, this is foreclosed by *Brown,* which considered *Cuneo* and necessarily determined that *Cuneo* did not stand for the proposition that attorney's fees

provisions are retroactive in cases where the government is the defendant absent a showing of Congressional intent. Moreover, Davis's suggestion that the amendment in *Brown* changed the law substantively, and so *Brown* is inapplicable to this case, is belied by *Brown*, in which the Court of Appeals considered only the issue of the retroactivity of interest on attorney's fees. *See Brown*, 78 F.3d at 647.

III. CONCLUSION

For the foregoing reasons, it is this 24th day of March 2009, hereby

ORDERED that Davis's motion for attorney's fees [# 266] is **DENIED**.

Henry H. Kennedy, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DAVIS, Plaintiff, v. **DEPARTMENT OF JUSTICE,** Defendant.	Civil Action 88-00130 (HHK)(AK)

REPORT AND RECOMMENDATION[1]

(Filed Apr. 29, 2008)

Pending before the undersigned are Plaintiff's Motion for Award of Attorney's Fees and Costs [266], Defendant's Opposition [269], and Plaintiff's Reply [270]. After considering the submissions of the parties, the undersigned issues the following Report and Recommendation.

I. Background

In 1986, Plaintiff John Davis submitted a request to the FBI for audiotapes recorded during a criminal investigation known as "BRILAB." *Davis v. Dep't of*

[1] This matter is referred to the undersigned for a Report and Recommendation on Plaintiff's Motion for Award of Attorney's Fees and Costs [266], pursuant to Local Civil Rule 72.3. (Order [275] dated 4/3/08.)

Justice, 460 F.3d 92, 95 (D.D.C. 2006) ("*Davis IV*"). Plaintiff sought these tapes as background for a book he intended to write about Mafia boss Carols [sic] Marcello. *Id.* at 96. After the FBI failed to release the tapes, Plaintiff filed suit under the Freedom of Information Act ("FOIA"). *Id.* The District Court ordered the FBI to release the tapes, reasoning that when they were played in court during Marcello's trial they were made part of the public record and therefore could not be withheld under FOIA. *Id.* The Court of Appeals reversed and remanded, holding that Plaintiff had the burden of demonstrating which tapes, or portions thereof, were actually played at the trial. *Id.* (citing *Davis v. Dep't of Justice*, 969 F.2d 1276, 1282 (D.C. Cir. 1992) ("*Davis I*")).

To meet his burden, Plaintiff produced docket entries and transcripts that indicated which tapes were played at Marcello's trial. *Id.* In response, the FBI produced 157 of the 163 tapes that were responsive to Plaintiff's initial request and indicated that it would have released one additional tape but could not locate it. *Id.* However, the FBI continued to withhold the remaining five tapes on the basis of FOIA Exemption 7(C), which permits an agency to withhold materials that were "compiled for law enforcement purposes" if their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* (quoting 5 U.S.C. § 552(b)(7)(C)). The District Court sustained the FBI's actions and Plaintiff appealed. *Id.*

The Court of Appeals remanded for a determination of "whether any of the five tapes withheld in their entirety . . . contains material that can be segregated and disclosed without unwarrantly impinging upon anyone's privacy." *Id.* (quoting *Davis v. Dep't of Justice,* No. 98-5080, 1998 WL 545422, at *1 (D.C. Cir. July 31, 1998) ("*Davis II*")). On remand, the FBI released one of the five tapes because the speaker on the tape had died, but continued to withhold the other four tapes in their entirety because it could not determine whether the speakers were alive. *Id.* The District Court held, on the basis of an affidavit submitted by the FBI, that the FBI had made adequate efforts to determine whether the speakers were alive or dead. *Id.*

Plaintiff appealed again and the Court of Appeals reversed, holding that the affidavit was "insufficient to determine the extent of the Bureau's efforts to ascertain whether the putative beneficiaries of Exemption 7(C) are alive or dead." *Id.* at 96-97 (quoting *Davis v. Dep't of Justice,* No. 00-5414, 2001 WL 1488882, at *1 (D.C. Cir. Oct. 17, 2001) ("*Davis III*")). The Court of Appeals remanded so that the FBI could indicate the sources it consulted and so the District Court could determine whether the FBI "did all it should have done." *Id.* at 97. On remand, the District Court ultimately granted summary judgment in favor of the FBI and dismissed Plaintiff's FOIA complaint. *Id.*

Plaintiff appealed, challenging the District Court's grant of summary judgment and an earlier order from

the District Court denying Plaintiff's motion for an award of attorney's fees. *Id.* The Court of Appeals affirmed the District Court's denial of fees. *Id.* at 106. The Court applied the standard set forth in *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Department of Energy,* 288 F.3d 452 (D.C. Cir. 2002) ("*OCAW*"), which held that a litigant is not eligible for attorney's fees under FOIA unless he has "been awarded some relief by [a] court, either in a judgment on the merits or in a court-ordered consent decree." *Id.* at 105 (citing *OCAW,* 288 F.3d at 456). Because none of the 158 tapes that Plaintiff received "were produced as the result of a judgment on the merits or a court-ordered consent decree," the Court of Appeals found that Plaintiff was not eligible for fees under FOIA. *Id.* at 105-106 (citations omitted).

The Court of Appeals also reversed the District Court's grant of summary judgment and "remanded with directions that the FBI evaluate alternative methods for determining whether the speakers on the requested audiotapes are dead, and that thereafter the district court determine whether the FBI's chosen course is reasonable." *Id.* at 106. Following *Davis IV,* the FBI conducted several new searches to comply with this mandate. (Mem. Op. [259] dated 12/3/07 at 2.) The District Court found that the FBI's search was reasonable and accordingly granted summary judgment for the FBI. (*Id.* at 8.)

Once again, Plaintiff appealed the District Court's determination. (*See* Notice of Appeal [265].) Plaintiff also filed a second Motion for Award of Attorney's

Fees and Costs. (*See* [266].) Plaintiff now asks the Court to revisit the issue of attorney's fees in light of the enactment of the Open Government Act of 2007, which amended the standard for determining whether a litigant is eligible for attorney's fees under FOIA. Defendant opposes this Motion, arguing that the 2007 amendments do not apply to this case and that the Court of Appeals' holding in *Davis IV* regarding attorney's fees is controlling.

II. Discussion

FOIA provides that a "court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under [Section 522] in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). Because the statute uses the word "may," an award of attorneys' fees under FOIA is not automatic. *Tax Analysts v. Dep't of Justice*, 759 F.Supp. 28, 29 (D.D.C. 1991). Rather, the trial court must determine (1) whether the plaintiff is *eligible* for an award of fees and costs and (2) whether the plaintiff is *entitled* to an award of fees and costs. *Church of Scientology of Ca. v. Harris*, 653 F.2d 584, 587 (D.C. Cir. 1981). Upon finding that such an award is warranted, the trial court must then determine whether the fees and costs sought by the plaintiff are reasonable. *See* § 552(a)(4)(E).

A. Plaintiff is Eligible for Attorneys' Fees

When Congress amended FOIA in 1974 to include the attorney fees provision, Congress failed to define the phrase "substantially prevailed," thereby leaving it to judicial interpretation. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 603 (2001), the Supreme Court construed fee provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act and held "that a 'prevailing party' is one who has been awarded some relief by the court." In so holding, the Court rejected the "catalyst theory," under which a litigant may be considered a prevailing party "where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 604. Therefore "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit," is insufficient to confer prevailing party status. *Id.* at 605. The D.C. Circuit extended the *Buckhannon* holding to FOIA's fee-shifting provision in *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Department of Energy,* 288 F.3d 452 (D.C. Cir. 2002) ("*OCAW*"). The Court in *OCAW* held "that in order for plaintiff in FOIA actions to become eligible for an award of attorney's fees, they must have 'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered consent decree." *OCAW,* 288 F.3d at 456-57 (quoting *Buckhannon*, 532 U.S. at 603).

In the instant litigation, both the District Court and the Court of Appeals have held that Plaintiff is not eligible for attorneys' fees under the *Buckhannon/OCAW* standard. *See Davis IV*, 460 F.3d at 106 (affirming the District Court's denial of Plaintiff's first attorneys' fees petition). However, after the Court of Appeals issued its opinion in *Davis IV*, Congress enacted the Open Government Act of 2007, which amended FOIA's attorney's fees provision to include a definition of "substantially prevailed." Effective December 31, 2007, this section now reads:

> (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
>
> (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either –
>
> > (I) a judicial order, or an enforceable written agreement or consent decree;
> >
> > or
> >
> > (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

5 U.S.C. § 522(a)(4)(E). Subpart (ii)(I) codifies the *Buckhannon/OCAW* standard while subpart (ii)(II) reinstates the "catalyst theory" that the Supreme Court rejected in *Buckhannon*.

Plaintiff now seeks to benefit from the fortuitous timing of this amendment. He argues that Congress's reinstatement of the catalyst theory should be given retroactive effect and accordingly the court should find that he is eligible for attorneys' fees. (Pl.'s Mot. at 10.) Specifically, the argues that:

> Prior to the institution of this lawsuit, none of the 163 audiotapes and no transcript had been released to Davis. After the lawsuit was commenced, 158 tapes and one transcript for a missing tape were released. But for this litigation, Davis would have obtained none of the records he requested. Therefore, it is clear that under the catalyst theory he has "substantially prevailed."

(*Id.*) Defendant does not dispute that Plaintiff would be eligible for fees under the catalyst theory, as embodied in § 522(a)(4)(E)(ii)(II). Therefore Plaintiff's eligibility for fees under FOIA turns on whether the December 2007 amendment applies retroactively to cases that were filed before its enactment.[2]

Courts "have long embraced a presumption against statutory retroactivity." *Landgraf v. USI Film*

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[2] In a recent decision, the Court of Appeals for the District of Columbia Circuit had an opportunity to address whether the amended section applies to pending cases. *See Judicial Watch v. Dep't of Justice*, ___ F.3d ___, 2008 WL 996103 (D.C. Cir. Apr. 11, 2008). Because the Court found that the plaintiff in that action "substantially prevailed" by obtaining a court order requiring release of the documents sought, the Court did not have to address the retroactivity of the amendment. *Id.* at *6.

Prods., 511 U.S. 255, 273 (1994). In *Landgraf*, the Supreme Court set forth a framework for evaluating statutes that were enacted after the events in the litigation:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280. However, the Supreme Court further explained that "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. For example, new procedural rules or statutes conferring jurisdiction may apply in suits filed before their enactment without raising the concerns that underly [sic] the presumption against retroactivity. *Id.* at 274-5.

The Supreme Court has held that fee shifting statutes do not resemble the types of cases in which the traditional presumption against retroactivity has

been invoked because "[a]ttorney's fee determination . . . are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Id.* at 277 (quoting *White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 451051 [sic] (1982)). In *Bradley v. School Board of City of Richmond,* 416 U.S. 696 (1974), the Supreme Court addressed whether plaintiffs in a desegregation action were entitled to attorneys' fees when the statute allowing for such fees, § 718 of Title VII of the Emergency School Aid Act, was not enacted until after the case was submitted to the Court of Appeals. The Court held that the plaintiffs were entitled to attorneys' fees under § 718, and based its holding "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary. *Bradley,* 416 U.S. at 711. The Court in *Landgraf* recognized the "apparent tension" between the traditional presumption against retroactivity and the principle relied upon in *Bradley,* but noted that *Bradley* was merely one of the many situations in which the presumption does not apply. *Landgraf,* 511 U.S. at 263, 277.

This Circuit applied *Bradley* in evaluating whether § 552(a)(4)(E), enacted in 1974, could be applied to an action that was commenced in 1967 but terminated after the statute's effective date. *Cuneo v. Rumsfeld,* 553 F.2d 1360 (D.C. Cir 1977), *overruled on other grounds by Baurka v. Dep't of Health and*

Human Servs., 142 F.3d 1286 (D.C. Cir. 1998). The Court noted that the statutory text was silent on the issue of retroactivity, but concluded that "[t]he substantial weight of judicial precedent is that the right to costs, including attorney fees, is controlled by the law at the time the action in terminated, and not the law in force at the time of commencement." *Cuneo*, 553 F.2d at 1367. Therefore, the Court held "that in an action which is terminated after 552(a)(4)(E)'s effective date, the trial court may award fees to a litigant who is otherwise deserving under that section." *Id.*

Based on these precedents, the undersigned concludes that § 552(a)(4)(E), as amended by the Open Government Act of 2007, controls Plaintiff's eligibility for attorneys' fees and costs because the present litigation was commenced before, and still pending as of, the statute's effective date. The undersigned further concludes that Plaintiff has substantially prevailed, as that term is defined in § 522(a)(4)(E)(ii)(II), because Defendant voluntarily produced 158 of the 163 tapes that Plaintiff sought. Accordingly the undersigned recommends that the trial court find that Plaintiff is eligible for an award of attorneys' fees.

B. Plaintiff is Entitled to Attorneys' Fees

Once a court concludes that a party is eligible for attorney's fees, the court must consider four factors to determine whether that party is entitled to an award

of fees. *Tax Analysts v. Dep't of Justice*, 759 F.Supp. 28, 29 (D.D.C. 1991). These factors, which reflect policy considerations behind FOIA, are: "(1) the benefit to the public; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law."[3] *Cuneo*, 553 F.2d at 1364. As one court has cautioned, however, "[t]hese are not airtight, independently indispensable prerequisites." *Crooker v. U.S. Parole Comm'n*, 776 F.2d 366, 367 (1st Cir. 1985). Rather, the Court must consider each factor separately. *Id.*

1. *Benefit to the Public*

Benefit to the public is "[p]robably the most important consideration in determining entitlement to fees in a FOIA case" because "[t]he underlying purpose of FOIA is to ensure that government is conducted in the open." *Miller v. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985). When applying this factor,

> a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public

[3] These factors were set forth in the Senate version of what was to become § 552(a)(4)(E). *Cuneo*, 553 F.2d at 1364. Although they were eliminated in conference, the conference report states that a court may take these criteria into account when exercising its discretion to award attorney's fees. *Id.*

> interest group was seeking information to further a project benefitting the general public, but it would not award fees if a business was using the FOIA to obtain data relating to a competitor or as a substitute for discovery in private litigation with the government.

Fenster v. Brown, 617 F.2d 740, 743 n.4 (D.C. Cir. 1979) (quoting S. REP. NO. 93-854 (1974)). Plaintiff argues, and Defendant does not dispute, that Plaintiff falls within the "favored class of requesters who 'ordinarily' would be awarded attorney's fees." The undersigned agrees, and concludes that the public benefit factor supports a finding that Plaintiff is entitled to an award of fees and costs.

2. *Commercial Benefit to Complainant and Nature of Complainant's Interest*

These two factors are "closely related and often considered together." *Tax Analysts v. Dep't of Justice,* 965 F.2d 1092, 1095 (D.C. Cir. 1992). The legislative history regarding the commercial benefit criterion makes clear that "news interests should not be considered commercial interests." *Fenster,* 617 F.2d at 743 n.4 (quoting S. REP. No. 93-854 (1974)). Similarly, in *Piper v. Dep't of Justice,* 339 F.Supp.2d 13, 22 (D.D.C. 2004), the Court found that the fact that an author would benefit financially from sales of a book that incorporated the requested records was "not sufficient to tip the scale in favor of characterizing plaintiff solely as a commercial requester." *See also*

Campell v. Dep't of Justice, 164 F.3d 20, 35-36 (D.C. Cir. 1998) (noting that "Congress did not intend for scholars . . . to forego compensation when acting within the scope of their professional roles"). As to the nature of the complainant's interest, a court should generally award fees under this criterion "if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented" as opposed to "frivolous or purely commercial in nature." *Fenster,* 617 F.2d at 743 n.4 (quoting S. REP. NO. 93-854 (1974)). In this case, Plaintiff's interest in the tapes was scholarly, and the fact that he might profit commercially from any resulting book does not disqualify him from receiving fees. Therefore these two factors support a finding that Plaintiff is entitled to a fee and cost award.

3. *Reasonable Basis in Law*

A court should "not award fees where the government's withholding had a colorable basis in law." *Fenster,* 617 F.2d at 743 n.4 (quoting S. REP. NO. 93-854 (1974)). Fees are appropriate, however, "if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." *Id. See also Cuneo,* 553 F.2d at 1366 ("What is required is as showing that the government had a reasonable basis in law for concluding that the information in issue was exempt and that it had not been recalcitrant in its opposition to a valid claim or otherwise engaged in obdurate behavior.") Plaintiff argues that "[t]he Government's actions in this case were designed to

frustrate the requester" and that Defendant resisted Plaintiff's requests throughout the litigation. (Pl.'s Mem. at 13-14.) Defendant responds that throughout the litigation history of this case, the Court of Appeals "always found that FOIA Exemption 7(C) was properly asserted" and accordingly the agency's decision to withhold the tapes on that ground had a reasonable basis in law. (Def.'s Opp'n at 14.)

This Circuit has held that "the reasonableness of the government's opposition does not preclude a recovery of costs and attorney's fees" because reasonableness "is but one aspect of the decision left to the discretion of the trial court." *Cuneo,* 553 F.2d at 1366. Therefore because the other three factors support an award of fees in this case, the trial court need not decide whether Defendant's decision to withhold the tapes had a reasonable basis in law.

After weighing the abovementioned factors, the undersigned finds that the balance tips in favor of an award of attorney's fees. Accordingly the undersigned recommends that the trial court find that Plaintiff is entitled to an award of attorneys' fees.

C. Plaintiff's Fee Request is Reasonable[4]

The starting point for calculating an award of attorney's fees and costs under the FOIA is the lodestar,

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[4] The undersigned notes that Defendant has not challenged the reasonableness of Plaintiff's fee request.

which is derived by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate. *Nat'l Treasury Employees Union v. Nixon,* 521 F.2d 317, 322 (D.C. Cir. 1975), *overruled on other grounds* by *Swedish Hosp. Corp. v. Shalala,* 1 F.3d 1261 (D.C. Cir. 1993). A prevailing party may recover fees and costs incurred during the litigation and in connection with the petition for fees. *See Consumers Union of U.S., Inc. v. Bd. of Governors of the Fed. Reserve Sys.,* 410 F.Supp. 63, 64 (D.D.C. 1976).

1. *Reasonableness of Number of Hours for Which Compensation is Sought*

Plaintiff seeks compensation for work that two attorneys, James Lesar and Daniel Alcorn, performed on this case. (Pl.'s Mem. at 14.) Specifically, Plaintiffs seek compensation for 350.1 hours that Mr. Lesar expended during the pendency of the litigation and an additional 33.7 hours that he expended in connection with the instant motion for fees. (Lesar Decl. of 10/10/00 [266-2] ("First Lesar Decl.") ¶ 6; Lesar Decl. of 2/5/08 [266-3] ("Second Lesar Decl.") ¶ 1; Lesar Decl. of 4/1/08 [273] ("Third Lesar Decl.") ¶ 2.) Plaintiffs also seek compensation for 23.8 hours expended by Mr. Alcorn during the litigation. (Alcorn Decl. of 1/20/98 [267] ¶ 5.) In sum, Plaintiffs seek compensation for 407.6 hours of work, a number that the undersigned concludes is reasonable for this litigation.

2. *Reasonableness of Hourly Rate*

Plaintiff uses the *Laffey* Matrix as a basis for the attorneys' reasonable hourly rates. This matrix, which is prepared annually by the Civil Division of the United States Attorney's Office for the District of Columbia, sets forth the prevailing market rates for attorneys at various levels of experience. *See Laffey* Matrix, *at* http:www.usdoj.gov/usao/dc/Divisions/Civil_Division. Taking into account Mr. Lesar's and Mr. Alcorn's legal experience, the relevant hourly rates are as follows:

Year Work Performed[5]	**Reasonable Hourly Rate**
1986-1987	$190
1987-1988	$200
1988-1989	$210
1989-1990	$260
1990-1991	$270
1991-1992	$285
1992-1993	$300
1993-1994	$305
1994-1995	$310
1996-1997	$325

[5] For purposes of the *Laffey* Matrix, years run from June 1 though [sic] May 31.

1997-1998	$330
1998-1999	$335
2000-2001	$350
2007-2008	$440

The undersigned recommends that the trial court calculate Plaintiff's fee award using these hourly rates.

3. *Lodestar Calculation*

The undersigned concluded above that Plaintiff reasonably expended 407.6 hours between the litigation of this case and the litigation of the instant motion. The undersigned further concluded above that it is reasonable to compensate the attorneys using the *Laffey* Matrix. After multiplying the number of hours reasonably expended by the applicable hourly rates, the resulting lodestar figure is $111,717.50.

4. *Reasonable Costs*

Section 522(a)(4)(e) explicitly provides for an award of litigation costs. Plaintiff's counsel state that they incurred $311.98 in costs. (First Lessar [sic] Decl. ¶ 8.) The undersigned finds that these costs are reasonable and recommends that the trial court include them when calculating Plaintiff's overall award.

III. Conclusion

For the foregoing reasons, the undersigned recommends that the trial court find that Plaintiff is both eligible for and entitled to attorneys' fees and costs under § 522(a)(4)(E). The undersigned further recommends that the trial court award Plaintiff $112,029.48, representing $111,717.50 in attorneys' fees and $311.98 in costs.

IV. Review by the District Court

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within ten days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn,* 474 U.S. 140 (1985). If this Report and Recommendation is served on the parties by mail, calculation of the time period for filing written objections is as follows: ten business days (excluding weekends and holidays) plus three calendar days (including weekends and holidays). *See*

CNPq-Conselho National De Desenvolvimento Cientifico E Technologico v. Inter-Trade, Inc., 50 F.3d 56, 58 (D.C. Cir. 1995) (per curium [sic]).

Dated: April 29, 2008

/s/
ALAN KAY
UNITED STATES
MAGISTRATE JUDGE

460 F.3d 92

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 13, 2006 Decided August 22, 2006

No. 04-5406

JOHN DAVIS,
APPELLANT

v.

DEPARTMENT OF JUSTICE,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 88cv00130)

James H. Lesar argued the cause and filed the briefs for appellant.

Heather Graham-Oliver, Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were *Kenneth L. Wainstein*, U.S. Attorney, and *Michael J. Ryan*, Assistant U.S. Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: This case involves four audiotapes recorded more than twenty-five years ago during an FBI corruption investigation in Louisiana. The plaintiff, an author, seeks release of the tapes under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. There are two speakers on the tapes, one a "prominent individual" who was a subject of the FBI's investigation, and the other an "undercover informant" in that investigation. The only question on this appeal is whether the FBI has undertaken reasonable steps to determine whether the speakers are now dead, in which event the privacy interests weighing against release would be diminished.

The FBI has not been able to determine whether either speaker is dead or alive. It says it cannot determine whether the speakers are over 100 years old (and thus presumed dead under FBI practice), because neither mentioned his birth date during the conversations that were surreptitiously recorded. It says it cannot determine whether the speakers are dead by referring to a Social Security database, because neither announced his social security number during the conversations. And it declines to search its own files for the speakers' birth dates or social security numbers, because that is not its practice. The Bureau does not appear to have contemplated

other ways of determining whether the speakers are dead, such as Googling them.[1]

We conclude that the FBI has not "made a reasonable effort to ascertain" whether the two speakers, on whose behalf it has invoked a privacy exemption from FOIA, are living or dead. *Schrecker v. Dep't of Justice,* 349 F.3d 657, 662 (D.C. Cir. 2003) ("*Schrecker II*"). As a consequence, there is a serious "'question whether the Bureau's invocation of the privacy interest represented a reasonable response to the FOIA request.'" *Id.* (quoting *Summers v. Dep't of Justice,* 140 F.3d 1077, 1085 (D.C. Cir. 2003) (Williams, J., concurring)). We therefore reverse the district court's dismissal of the plaintiff's FOIA complaint and remand for further proceedings.

I

This is the fourth time we have considered an appeal arising out of the FOIA dispute between Davis and the FBI. In 1986, Davis submitted a FOIA request for all audiotapes recorded during an FBI criminal investigation known as "BRILAB." That investigation, conducted during 1979-80, concerned bribery and racketeering activities among organized crime figures, politicians, and labor unions in Louisiana. The investigation led to the indictment of five

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[1] *See* Oxford English Dictionary Online, http://www.oed.com (defining "Google" as "to use the Google search engine to find information on the Internet").

individuals, two of whom were ultimately convicted – including reputed Mafia boss Carlos Marcello.[2] Portions of more than 130 BRILAB tape recordings were played at the defendants' 1981 trial. Davis sought the tapes as background for a book he subsequently published in 1989. *See* JOHN H. DAVIS, MAFIA KINGFISH: CARLOS MARCELLO AND THE ASSASSINATION OF JOHN F. KENNEDY (McGraw-Hill 1989).

After the government refused to release the tapes, Davis brought suit pursuant to FOIA. *See* 5 U.S.C. § 552(a)(4)(B). The government contended that each tape was properly withheld under one or more statutory exemptions, but the district court concluded that material "unconditionally revealed in open court . . . enter[s] the public domain beyond recall for all time" and therefore cannot be withheld under FOIA. *Davis v. Dep't of Justice,* No. 88-0130, Order at 3 (D.D.C. May 6, 1991). Although the government argued that it was no longer possible to determine which of a "play list" of 163 taped excerpts had actually been played in the courtroom, the district court held that the government bore the burden of showing that the tapes had not entered the public record and must "suffer the consequences of the impasse." *Id.* at 4. The court ordered release of all the tapes.

On appeal, this court reversed. *See Davis v. Dep't of Justice,* 968 F.2d 1276, 1282 (D.C. Cir. 1992)

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[2] The convictions were later overturned on collateral review. *See United States v. Marcello,* 876 F.2d 1147 (5th Cir. 1989).

("*Davis I*"). We held that, while the ultimate burden of persuasion remains on the government, "a party who asserts that material is publicly available carries the burden of production on that issue." *Davis I,* 968 F.2d at 1279 (emphasis omitted). We then remanded to give Davis an opportunity to show that the tapes he sought, or portions of them, were played at the trial. *Id.* at 1282.

In an effort to meet his burden under *Davis I,* Davis produced docket entries and transcripts from the Marcello trial. In response, the FBI released 157 of the 163 tapes and said it would have released another tape but could not find it. The FBI continued to withhold the five remaining tapes on the basis of FOIA Exemption 7(C), which permits an agency to withhold otherwise disclosable records if they were "compiled for law enforcement purposes" and their release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(7)(C). The district court sustained the FBI's actions. *See Davis v. Dep't of Justice,* No. 88-0130, Order at 15 (D.D.C. Oct. 16, 1997).

Davis appealed a second time. In *Davis II,* we upheld the district court's determination that the FBI's search for the missing tape was adequate. *See Davis v. Dep't of Justice,* 1998 WL 545422, at *1 (D.C. Cir. July 31, 1998) ("*Davis II*"). We again remanded, however, this time for the court to determine "whether any of the five tapes withheld in their entirety . . . contains material that can be segregated

and disclosed without unwarrantably impinging upon anyone's privacy." *Id.*

On remand, the FBI determined that it could release one of the five tapes because the principal speaker on the tape had died. But the Bureau concluded that the remaining four tapes were wholly subject to Exemption 7(C), because it could not determine whether the speakers on those tapes were living or dead. *See* Decl. of Scott A. Hodes ¶¶ 5, 7 (Nov. 24, 1998). Citing an FBI affidavit, *see id.* ¶ 7, the district court held that the "defendant has made adequate efforts to establish that the speakers on these tapes are not deceased." *Davis v. Dep't of Justice,* No. 88-0130, Order at 2 (D.D.C. Sept. 15, 2000).

Once again, Davis appealed. In *Davis III,* we summarily reversed the district court and again remanded the case. *See Davis v. Dep't of Justice,* 2001 WL 1488882, at *1 (D.C. Cir. Oct. 17, 2001) ("*Davis III*"). "The FBI's affidavit," we held, was "insufficient to determine the extent of the Bureau's efforts to ascertain whether putative beneficiaries of Exemption 7(C) are alive or dead." *Id.* As a consequence, we were "unable to say 'whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue.'" *Id.* (quoting *Schrecker v. Dep't of Justice,* 254 F.3d 162, 167 (D.C. Cir. 2001) ("*Schrecker I*")). Citing our recent opinion in *Schrecker v. Department of Justice*, we remanded so that "the FBI may document what sources it consulted, and the district court can decide in the first instance whether the government

'did all it should have done, and whether it may withhold the disputed information pursuant to Exemption 7(C).'" *Id.* (quoting *Schrecker I*, 254 F.3d at 167).

Following our remand order, the FBI filed two more affidavits, spelling out the steps it took to determine whether the speakers were dead or alive, and declaring that those steps did not establish that the speakers on the tapes were deceased. *See* Second Decl. of Scott A. Hodes (Feb. 26, 2002); Third Decl. of Scott A. Hodes (July 11, 2002). We detail those steps in Part II.A below. The FBI's filings make clear that there are only "two speakers on the audiotapes at issue." Def.'s Mot. for Recons. at 3 (citing Fourth Decl. of Scott A. Hodes ¶ 4 (Aug. 7, 2002)). According to the government, the four tapes come from the FBI's undercover investigation of a "prominent individual," and the speakers are that "prominent individual and the undercover informant." Appellee's Br. 11 (citing affidavits).

In July 2002, unsatisfied with the government's efforts, the district court ordered the FBI to advise each of the two speakers, "by first class mail[,] . . . of defendant's obligation pursuant to this Order to [release the tapes] unless the speaker objects thereto in writing within 30 days." *Davis v. Dep't of Justice*, No. 88-0130, Order at 1 (D.D.C. July 23, 2002). More than a year later, after this court issued a subsequent opinion in the *Schrecker* case, *see Schrecker II*, 349 F.3d at 657, the government asked the district court to reconsider that order. On August 31, 2004, the

court granted the motion to reconsider, "relieve[d] the government from undertaking the additional tasks mandated" in its July 2002 order, and granted summary judgment in favor of the FBI. *Davis v. Dep't of Justice*, No. 88-0130, Order at 1 (D.D.C. Aug 31, 2004).

Davis then filed his fourth notice of appeal, challenging both the district court's grant of summary judgment dismissing his FOIA complaint, and an earlier order denying his motion for an award of attorney's fees. We consider the former in Part II and the latter in Part III. We "review de novo a decision granting summary judgment to an agency claiming to have complied with FOIA." *Schrecker II*, 349 F.3d at 661-62. We also review de novo a district court's attorney's fees determination, like the one at issue here, that "rests on an interpretation of the statutory terms that define eligibility for an award." *Edmonds v. FBI*, 417 F.3d 1319, 1322 (D.C. Cir. 2005) (internal quotation marks omitted).

II

FOIA Exemption 7(C) exempts law enforcement records from release "to the extent that" release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In deciding whether the release of particular information constitutes an "unwarranted" invasion of privacy, an agency must balance the privacy interest at stake against the public interest in

disclosure. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989); *Schrecker I*, 254 F.3d at 166. We have recognized "that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased." *Schrecker II*, 349 F.3d at 661. Indeed, the "fact of death, . . . while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information." *Id.* (quoting *Schrecker I*, 254 F.3d at 166). Consequently, "without confirmation that the Government took certain basic steps to ascertain whether an individual was dead or alive, we are unable to say whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue." *Schrecker I*, 254 F.3d at 167.

The government's obligation in this regard is to "ma[k]e a reasonable effort to ascertain life status." *Schrecker II*, 349 F.3d at 662. Its "efforts must be assessed in light of the accessibility of the relevant information." *Id.* As we said in *Schrecker II*, there "'would be a question whether the Bureau's invocation of the privacy interest represented a reasonable response to the FOIA request . . . *if the Bureau has, or has ready access to, data bases that could resolve the issue.*'" *Id.* (quoting *Summers*, 140 F.3d at 1085 (Williams, J., concurring)) (emphasis added in *Schrecker II*). In short, "the proper inquiry is whether the Government has made reasonable use of the information readily available to it, and whether there

exist reasonable alternative methods that the Government failed to employ." *Schrecker II,* 349 F.3d at 662.

A

The government's affidavits and pleadings declare that the FBI took three steps to determine whether the two speakers on the tapes were deceased. The Bureau reports that, because those individuals' deaths could not "be ascertained" by these methods, "the four tapes were withheld in full pursuant to exemption b(7)(C)." Second Hodes Decl. ¶ 8. Of course, "[t]he failure to discover the information sought is not conclusive evidence that the agency has failed to make a reasonable effort." *Schrecker II,* 349 F.3d at 662. Here, however, the government's own declarations provide that evidence.[3]

1. The government describes the first method it employed in the following paragraph from its principal affidavit:

> The FBI has institutional knowledge of the death of certain individuals from the processing of prior FOIA requests or internal records. The FBI relies on this institutional knowledge, as well as *Who Was Who,* a book of famous individuals [who have died].

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[3] We measure the reasonable sufficiency of the government's effort on the basis of the aggregate of the steps it took, not on the basis of any individual step alone.

Second Hodes Decl ¶ 5. From this description, it appears that the government's first step involved resort to two different sources: institutional knowledge and *Who Was Who*.

If the FBI truly used its "institutional knowledge" to determine whether the speakers were dead or alive, this first step might well be reasonable. But the Bureau's method of accessing that knowledge is so constrained as to render it effectively useless. Although the affidavit could be read as suggesting that the FBI uses its "internal records" to determine an individual's status, the same affidavit indicates that the Bureau did *not* search any records that were not themselves "responsive" to Davis' FOIA request – that is, it did not search any records other than the audiotapes themselves. *See* Second Hodes Decl. ¶¶ 6, 7.[4] Needless to say, the tapes themselves disclose nothing on this point, other than that the speakers were alive when they were speaking sometime during 1979-80.

The only other piece of "institutional knowledge" mentioned in the FBI's description is knowledge

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[4] Subsequently, the FBI did conduct one search of its internal records. According to another affidavit, the FBI searched a specific index in its Criminal Justice Information Service Division for the names of the speakers. However, "the only individuals . . . within the index[ ] are those whose fingerprints are taken from corpses by law enforcement personnel." Third Hodes Decl. ¶ 4. There was no reason – or at least none has been offered – to suggest that a search of this index was likely to be productive, and apparently it was not.

gained from "the processing of prior FOIA requests." Second Hodes Decl. ¶ 5. We have no idea what that means. On its face, however, its utility must depend upon there having been a prior FOIA request involving the same individuals. The FBI does not suggest that there had ever been such a request.

If the FBI's reference to its institutional knowledge means anything more than what we have just described, we cannot determine that from the affidavit the Bureau filed. What we said of an earlier affidavit in this case, one that made a similar reference to the FBI's "institutional knowledge," remains equally true regarding this affidavit's treatment of that subject: "The FBI's affidavit is insufficient to determine the extent of the Bureau's efforts to ascertain whether putative beneficiaries of Exemption 7(C) are alive or dead." *Davis III,* 2001 WL 1488882, at *1. Indeed, with respect to the FBI's reliance on its institutional knowledge, it appears that the Bureau has "been completely passive on the issue, taking death into account only if the fact has happened to swim into [its agents'] line of vision." *Summers,* 140 F.3d at 1085 (Williams, J., concurring); *see also Schrecker I,* 254 F.3d at 167 (reversing and remanding the district court's judgment regarding the applicability of Exemption 7(C) because the FBI's affidavit was too vague to determine if the agency had taken "certain basic steps to ascertain whether an individual was dead or alive").

The other source mentioned in the FBI's affidavit is *Who Was Who,* a multi-volume set of books

published periodically by Marquis Who's Who, LLC. Each new volume "includes the biographies of the most prominent and noteworthy people who have died since the publication of the previous edition."[5] It is a select company: of the more than 7.2 million Americans who died during 2000-02,[6] for example, no more than 4000 are portrayed in the *Who Was Who* volume covering that period. *See* 14 WHO WAS WHO IN AMERICA, 2000-02 (2002). How one earns a place in it is unclear, although Marquis reports that most of the entries were originally listed with the subjects' permission in its sister *Who's Who in America* publication, and that many of the biographies "have been scrutinized and revised by relatives or legal representatives of the deceased Biographee." *Id.* at vi. All of this suggests both considerable self-selection and considerable lag time.

The government describes one of the two speakers at issue here as a "prominent individual" and the other as an "undercover informant." Appellee's Br. 11. The latter seems unlikely to qualify for the distinction of a *Who Was Who* entry, and we have no way of knowing whether the former was prominent enough

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[5] Marquis Who's Who, LLC, Home Page, http://www.marquiswhoswho.com.

[6] Centers for Disease Control and Prevention (CDC), *Deaths: Final Data for 2002*, NAT'L VITAL STAT. REP., Oct. 12, 2004, at 1; CDC, *Deaths: Final Data for 2001*, NAT'L VITAL STAT. REP., Sept. 18, 2003, at 1; CDC, *Deaths: Final Data for 2000*, NAT'L VITAL STAT. REP., Sept. 16, 2002, at 1.

to qualify. Accordingly, we cannot conclude that the FBI's first method – reference to its institutional knowledge and to *Who Was Who* – was reasonably calculated to determine whether the speakers on the tapes were living or dead.

2. The government describes the second method it employed as follows:

> *When birth dates are provided in responsive records,* and these dates indicate the individual would be over 100 years of age, the name and/or any other identifiers will be released. Although the FBI is aware that many individuals live to be older than 100 years of age, . . . the FBI has consistently relied upon the 100-year rule in all of its FOIA processing.

Second Hodes Decl. ¶ 6 (emphasis added). The key to the utility of the FBI's 100-year rule is the clause that we have italicized. As explained above, when the FBI refers to "responsive records," it means those records – and only those records – actually sought in the FOIA request. In this case, the only responsive records were the audiotapes, and "there were no birth dates on these tapes." Second Hodes Decl. ¶ 6. Therefore, the affidavit concludes, since "no birth dates were provided in the responsive records, the FBI did not assume death of the individuals speaking on these tapes." *Id.*

The reasonableness of this second method obviously depends upon the probability that the responsive

records will contain the individual's birth date – as might well be the case if the records sought by the FOIA requester were FBI investigative reports or personnel files. But unless the FBI has tape recorded a birthday party, it seems highly unlikely that the participants in an audiotaped conversation would have announced their ages or dates of birth.[7] Accordingly, this second method was also destined to fail, as it did.

3. The third method the FBI used was the following:

> *If a social security number is revealed on the responsive records,* the FBI, in its administrative discretion, may check the Social Security Death Index (SSDI) – a database maintained by a third party on the Internet. This website is maintained by a private individual, and the FBI cannot verify or vouch for the accuracy of this index, which the website purchases from the Social Security Administration.

Second Hodes Decl. ¶ 7 (emphasis added). Once again, the rub is that the FBI will not even check the Social Security Death Index unless the speaker's social security number is revealed on responsive records. *See id.* (declaring that the "FBI does not research

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[7] Although a tape might also reveal a speaker's birth date if that date were inscribed on the outside of the cassette that holds the tape, the government provides no information as to whether that is ever the case.

third-party names internally to discover social security" numbers). As expected, the FBI reports that, because "[t]his case concerns audio tapes," and "[a]s no social security numbers are on the tapes at issue, this website [the SSDI] was not checked." Needless to say, no one announces his or her social security number in ordinary conversation – not even at a birthday party. Accordingly, the Bureau again utilized a method that could not help but fail in the circumstances of this case.

4. As we have discussed, none of the three methods used by the FBI had any likelihood of discovering whether the two individuals, whose conversations were captured by the audiotapes in question, were living or dead. Indeed, if the FBI limits itself to those methods in the future, it is doubtful that it will ever be able to discover the status of a speaker on an audiotape. Although futility alone may not render the FBI's efforts unreasonable, it surely is an important factor in the equation.

The other factor we must consider is "whether the Government has made reasonable use of the information readily available to it, and whether there exist reasonable alternative methods that the Government failed to employ." *Schrecker II*, 349 F.3d at 662. As we have said, the question is whether "*the Bureau has, or has ready access to, data bases that could resolve the issue.*" *Id.* (internal quotation marks omitted). We now consider some of the alternatives the FBI failed to employ.

Turning first to the FBI's internal records, we cannot conclude that the government "made reasonable use" of its own information in this case. The flaw in the government's 100-year rule and Social Security Death Index methodologies – at least as far as audiotapes are concerned – is that the Bureau refused to look anywhere but in the tapes themselves to discover the speakers' birth dates or social security numbers. This meant that, even if those personal identifiers were present in other FBI records, the FBI would not have found them. In this case, it is not unlikely that such other records do exist. In an FBI undercover operation like BRILAB, for example, one would expect to find investigative reports that list the various players (witnesses, informants, subjects, targets) and identifying information about them.[8] The FBI's Electronic Surveillance (ELSUR) indices also may well contain the necessary personal identifiers for the two individuals, whose voices were captured by electronic surveillance.[9]

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[8] *See, e.g., Blanton v. Dep't of Justice,* 64 Fed. Appx. 787, 788 (D.C. Cir. 2003) (noting that the FBI maintained "informant files" relating to an investigation); *Perri v. United States,* 53 Fed. Cl. 381, 395-96 (2002) (noting that the FBI maintained a "137 (Confidential Informant) File" and a "270 (Cooperative Witness) File" in an undercover operation); *Meeropol v. Meese,* 790 F.2d 942, 947 (D.C. Cir. 1986) (noting that the FBI maintained "subject files" regarding eleven named principals).

[9] *See Wheeler v. Dep't of Justice,* 403 F. Supp. 2d 1, 4 (D.D.C. 2005) (noting that, through ELSUR, "the FBI maintains information on all subjects whose electronic and/or voice communications have been intercepted by the FBI since January 1,

(Continued on following page)

The FBI has neither denied that it has such records nor suggested that it would be difficult to access them in this case. To the contrary, yet another FBI affidavit explains that the Bureau's Central Records System (CRS) contains "all pertinent information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities," and makes clear that much of that system can be searched by an individual's name. Fourth Hodes Decl. ¶ 7. For example, with respect to FBI Headquarters:

> Communications directed to FBIHQ from the various field offices . . . are filed in the pertinent case files and *indexed to the names of individuals,* groups, or organizations *which are listed* in the case caption(s) or title(s) *as a subject*(s), a suspect(s), or as a victim(s). Therefore, for example, *a search made in this index to locate records concerning a particular individual would be made by searching the name of that individual* in the index.

Id. ¶ 8 (emphasis added). And similarly, with respect to FBI field offices:

> Access to the CRS files at FBI field divisions is also afforded by the General Indices (automated and manual), which are likewise arranged in alphabetical order, and consist of

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1960," and that ELSUR can be searched by name, "date of birth, place of birth and social security number"); *see also Campbell v. Dep't of Justice,* 164 F.3d 20, 29 (D.C. Cir. 1998) (remanding with instructions that the FBI search its ELSUR records).

> an index on various subjects, including the names of individuals and organizations. *Searches made in the General Indices to locate records concerning a particular subject, such as John Doe, are made by searching the subject requested* in the index. Indexing functions have been automated by field divisions.

Id. ¶ 9 (emphasis added).

It is plain, then, that the FBI could have searched its files by the names of the two speakers – one the subject of a criminal investigation, the other an informant – to determine whether records in those files disclose their dates of birth or social security numbers (or even their deaths). But the FBI did not do so. *See* Second Hodes Decl. ¶¶ 6, 7. The Bureau gave no reason at all for not searching its records for the speakers' birth dates, and only one reason for not searching for their social security numbers:

> The FBI does not research third-party names internally to discover social security [numbers] because to do so would violate these third parties' privacy rights. The records that may possess these individual[s'] social security numbers were created for law enforcement purposes; they were not created for the purpose of ascertaining whether individuals contained in FBI records are still alive.

Second Hodes Decl. ¶ 7. We expressly rejected this precise rationale (asserted by the same FBI declarant) in *Schrecker II,* saying: "We fail to see how the purpose for which an internal record was created

bears on whether searching the record for an individual's social security number would violate that individual's privacy." 349 F.3d at 664.

Turning from the FBI's own databases to those it "*has ready access to*," *id.* at 662 (internal quotation marks omitted), we have to ask why the FBI limited itself to *Who Was Who*. The fact that the Bureau uses such an outside source indicates that there is no bar to its doing so. And apparently the biographies of the decedents contained in those books make it possible to determine that the "John Doe" for whom the FBI is searching is the same John Doe whose death is there reported. *See infra* Part II.B.

But if that is so, one has to ask why – in the age of the Internet – the FBI restricts itself to a dead-tree source with a considerable time lag between death and publication, with limited utility for the FBI's purpose, and with entries restricted to a small fraction of even the "prominent and noteworthy"? Why, in short, doesn't the FBI just Google the two names? Surely, in the Internet age, a "reasonable alternative" for finding out whether a prominent person is dead is to use Google (or any other search engine) to find a report of that person's death.[10] Moreover, while

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[10] That is particularly so here, since an FBI affidavit declared that the Bureau knew the "prominent individual" at issue was alive as recently as 1994. Decl. of Robert A. Moran ¶ 19 (Oct. 21, 1994). (How the FBI knew the individual was living in 1994, but could not determine whether he was living or dead by 1998, remains a mystery.)

finding a death notice for the second speaker – the informant-may be harder (assuming that he was not prominent), Googling also provides ready access to hundreds of websites collecting obituaries from all over the country, any one of which might resolve that speaker's status as well. *See, e.g.,* http://www.legacy.com (hosting the obituary sites of more than 275 newspapers, including three Louisiana papers); http://www.obituarycentral.com (containing a directory of links to online obituaries and death notices in every state).

We do not suggest that the FBI must use one, or any, of the search methods outlined above. But when the only search methods the FBI did employ were plainly fated to reach a dead end (in a manner of speaking), and when there appear to be reasonable alternatives that the government failed to consider, there is a serious "question whether the Bureau's invocation of the privacy interest represented a reasonable response to the FOIA request." *Schrecker II,* 349 F.3d at 662 (internal quotation marks omitted). This a question that has not yet been answered, and that the district court must address on remand.

B

The government does not dispute that the steps the FBI took to determine whether the speakers on the audiotapes were dead could not reasonably be expected to answer that question. Nor does it contend that resort to any of the alternatives identified above would be burdensome on the facts of this case.

Instead, its argument is simply that "the steps taken by the FBI here were the same taken by the FBI in *Schrecker II*," and that because we affirmed the grant of summary judgment for the government there, we must do so here as well. Appellee's Br. 9; *see* Oral Arg. Tape at 29:15-34:12 (confirming the government's view that the FBI does not have to search for the speakers' birth dates or social security numbers, even if it knows they can quickly be found by a name search, because "there is no obligation under *Schrecker* to conduct additional searches" of nonresponsive records). That is a serious misreading of *Schrecker II*.

It is true that the three methods the FBI employed to determine whether individuals mentioned in responsive records in *Schrecker II* were dead are the same as those it employed in this case. *See Schrecker II*, 349 F.3d at 660. It is also true that we affirmed summary judgment in that case, holding, in particular, that the Bureau did not have to examine nonresponsive internal records for the mentioned individuals' birth dates or social security numbers. *Id.* at 663-65. But *Schrecker II* did not purport to affirm a set of search methodologies as per se sufficient to satisfy the "reasonable efforts" standard. *Id.* at 662. To the contrary, we noted that the "'adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case.'" *Id.* at 663 (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (additional quotation marks omitted). And we expressly "cautioned . . . that it would be inappropriate for the court

to mandate 'a bright-line set of steps for an agency to take in this situation,'" because FOIA requires "'both systemic and case-specific exercises of discretion and administrative judgment and expertise.'" *Id.* at 662 (quoting *Johnson v. Executive Office for U.S. Attorneys,* 310 F.3d 771, 776 (D.C. Cir. 2002)).

Our determination in *Schrecker II,* that in that case the FBI had reasonably decided to examine only responsive records for birth dates and social security numbers, is distinguishable from this case in two important respects. First, *Schrecker* involved a FOIA request not for audiotapes, but for documents. Although there is virtually no chance that a speaker will announce those personal identifiers during an oral conversation, there is a reasonable probability that they will be contained in responsive documents. Indeed, in *Schrecker II* itself, the FBI found the birth dates and social security numbers of at least some of the mentioned individuals in a search of responsive pages. 349 F.3d at 663, 664.

Second, at issue in *Schrecker II* were 113 names appearing in over 24,000 responsive documents, making a search of nonresponsive documents for personal identifiers "unduly burdensome." *Id.* at 664. That burden was magnified by the fact that the 113 names were not those of the subjects of an FBI investigation, but rather were merely mentioned in documents relating to that investigation. This meant that "any name-based search would likely encounter . . . duplication" of common names, "making verification difficult or impossible." *Id.* It also meant that the

prospects of success were "dubious." *Id.* Under those circumstances, we held that to "require the Government to shoulder such a potentially onerous task . . . goes well beyond the 'reasonable effort' demanded in this context." *Id.*

But Davis' FOIA request entails no such burden. Here, there are only two names and only four responsive records. Those two names belong to the prominent subject of a major FBI investigation, and to the FBI's own undercover informant. Given the Bureau's knowledge of their biographies, even if those individuals have common names, verification that a name-based search has produced records that relate to them would be neither "difficult [n]or impossible." *Id.* While there may be thousands of John Does, there are unlikely to be thousands connected with the BRILAB investigation. And given the fact that the FBI maintains name-specific records regarding its subjects and informants, *see* Fourth Hodes Decl. ¶¶ 8, 9 (quoted *supra* Part II.A.4); cases cited *supra* notes 8 & 9, here a name-based search would not have "dubious prospects of success." *Schrecker II*, 349 F.3d at 664.

Indeed, the request in this case looks less like the one at issue in *Schrecker II* and more like one that *Schrecker II* expressly distinguished. The latter involved another FOIA request by Ellen Schrecker, for documents relating to Joseph Fischetti, a Chicago-based organized-crime figure. As we explained, "Fischetti was the *sole subject* of that FOIA request, not one of a *multitude of third parties* appearing in

responsive documents." *Id.* at 664 (emphasis in original). The request in *Schrecker II* was different, we said, because "[w]hile it may be reasonable to pursue internal research to determine whether a single subject is the same individual shown by the [Social Security Death Index] to be deceased, . . . it would be unduly burdensome to require the Government [to] do so for the large number of third parties appearing in documents responsive to Schrecker's request." *Id.* Davis' request, involving only two names in four audiotapes, is far closer to the Fischetti request than to the one we dismissed in *Schrecker II*.[11]

To repeat what we said at the beginning of this subpart, there is no "bright-line set of steps for an agency to take in this situation." *Id.* at 662 (internal quotation marks omitted). Rather, the "adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Id.* at 663 (internal quotation marks omitted). In determining whether an agency's search is reasonable, a court must consider the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives. In this case, the methodology employed by the agency was

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[11] We note the possibility that a FOIA requester could attempt to circumvent this distinction by slicing a single request for many names into multiple requests of one name each. We are confident, however, that a district court would be able to see through such a ruse.

extremely unlikely to produce the needed information, and it appears – although we do not know for certain – that there are readily available alternatives that would not impose an undue burden on the government. We remand to permit the agency an opportunity to evaluate the alternatives, and either to conduct a further search or to explain satisfactorily why it should not be required to do so.

III

Finally, we address Davis' request for an award of attorney's fees, which the district court denied on the authority of this circuit's decision in *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) ("*OCAW*"). *See Davis*, Order at 2 (July 23, 2002). The district court's denial was correct. *OCAW* forecloses a decision in Davis' favor.

FOIA provides that a district court "may assess against the United States reasonable attorney fees . . . reasonably incurred in any case under this section in which the complainant has *substantially prevailed*." 5 U.S.C. § 552(a)(4)(E) (emphasis added). In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), the Supreme Court construed the attorney's fees provision of two other statutes that

permit courts to award fees to a "prevailing party."[12] The Court rejected the plaintiffs' contention, which it characterized as the "catalyst theory," that "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601. Rather, the Court ruled that, for a litigant to be a "prevailing party," there must have been a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. "[E]nforceable judgments on the merits and court-ordered consent decrees," the Court said, suffice to create such a change. *Id.* at 604.

In *OCAW*, this circuit extended the holding of *Buckhannon* to the fee-shifting provision of FOIA. 288 F.3d at 454-57. The *OCAW* court concluded that "the 'substantially prevail' language in FOIA [is] the functional equivalent of the 'prevailing party' language found in" the statutes interpreted in *Buckhannon*. *Id.* at 455-56. It "therefore h[e]ld that in order for plaintiffs in FOIA actions to become eligible for an award of attorney's fees, *they must have 'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered consent decree.*" *Id.* at 456-57 (quoting *Buckhannon*, 532 U.S. at 603) (emphasis added).

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[12] At issue in *Buckhannon* were provisions of the Fair Housing Amendments Act, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act, 42 U.S.C. § 12205.

Davis' problem is that, although to date he has received a total of 158 tapes from the government, none were produced as the result of a "judgment on the merits" or a "court-ordered consent decree." *Id.* at 457. It is true that, in 1991, he did secure such a judgment from the district court, directing the FBI to release 163 tapes. But that judgment was reversed by this court in *Davis I*, and the government's subsequent release of 157 of those tapes – after the FBI determined that they had been played at the trial – was not made pursuant to any judgment or order. Similarly, although *Davis II* remanded for the district court to determine whether any of the remaining tapes contained material that could be segregated, *Davis II*, 1998 WL 545422, at *1, such a remand is insufficient to satisfy the *OCAW* test.[13] The FBI's subsequent release of an additional tape (after determining that the speaker was dead) similarly was not pursuant to a judgment or order.

Davis appears to recognize the futility of his effort to distinguish *OCAW*, as his brief devotes considerably more pages to arguing that *OCAW* was wrongly decided than to arguing that it can be distinguished. *See* Appellant's Br. 24-28. The former is an

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[13] *See OCAW*, 288 F.3d at 458 (holding that an order directing the government to review documents by a specified date did not qualify the plaintiffs as "prevailing," because it did "not order[ ] the [agency] to turn over any documents" or "disallow any of the [agency's] justifications for exempting documents, or portions of documents, from disclosure").

argument that we cannot entertain, because "[o]ne three-judge panel . . . does not have the authority to overrule another three-judge panel of the court." *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). We therefore conclude that the district court correctly determined that it could not grant Davis' request for attorney's fees.

IV

For the foregoing reasons, we affirm the district court's denial of attorney's fees, but we reverse its grant of summary judgment dismissing Davis' FOIA complaint. The case is remanded with directions that the FBI evaluate alternative methods for determining whether the speakers on the requested audiotapes are dead, and that thereafter the district court determine whether the FBI's chosen course is reasonable.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5414 **September Term, 2001**
88cv00130

John Davis, **Filed On:** Oct. 17, 2001

Appellant

v.

Department of Justice,

Appellee

BEFORE: Rogers and Tatel, Circuit Judges; Williams, Senior Circuit Judge

ORDER

Upon consideration of the court's order filed May 4, 2001, deferring consideration of the motion for summary affirmance pending disposition of No. 00-5033, *Schrecker v. United States Dep't of Justice*, which was decided by this court on June 26, 2001; the renewed motion for summary affirmance, the response thereto, and the reply; and the motion for summary reversal, the response thereto, and the reply, it is

ORDERED that the motions for summary affirmance be denied, the motion for summary reversal be granted, and the case remanded to the district court for further proceedings. The FBI's affidavit is

insufficient to determine the extent of the Bureau's efforts to ascertain whether putative beneficiaries of Exemption 7(C) are alive or dead. *See Campbell v. United States Dep't of Justice*, 164 F.3d 20, 30, 34 (D.C. Cir. 1998); 5 U.S.C. § 552(b)(7)(C). Thus, we are unable to say "whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the information at issue." *Schrecker v. United States Dep't of Justice*, 254 F.3d 162, 166-67 (D.C. Cir. 2001). We therefore reverse this aspect of the district court's judgment; on remand the FBI may document what sources it consulted, and the district court can decide in the first instance whether the government "did all it should have done, and whether it may withhold the disputed information pursuant to Exemption 7(C)." *Id.* at 167.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

1998 WL 545422 (D.C.Cir.)

United States Court of Appeals,
District of Columbia Circuit.
John DAVIS, Appellant
v.
DEPARTMENT OF JUSTICE, Appellee
No. 98-5080.

July 31, 1998.

BEFORE: WALD, SILBERMAN, and HENDERSON, Circuit Judges

ORDER

PER CURIAM.

Upon consideration of the motion for summary affirmance and the response thereto, it is

ORDERED that the motion for summary affirmance be granted in part. The district court correctly determined that the Department of Justice provided a sufficient basis for granting summary judgment on the adequacy of the Department's search for tape # 127 and the transcripts of tapes admitted into evidence at the 1981 trial of Carlos Marcello. Although these items were not located, the Department demonstrated that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested. *See Oglesby v. United States Dep't of Army*, 920 F.2d 57, 68 (D.C.Cir.1990). With respect to this issue, the merits of the parties' positions are so clear as to warrant summary action.

See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir.1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C.Cir.) (per curiam), *cert. denied*, 449 U.S. 994, 101 S.Ct. 532, 66 L.Ed.2d 292 (1980). It is

FURTHER ORDERED that the case be remanded to the district court to determine whether any of the five tapes withheld in their entirety (numbered 2, 3, 6, 31, and 151) contains material that can be segregated and disclosed without unwarrantably impinging upon anyone's privacy. *See Kimberlin v. Department of Justice*, 139 F.3d 944, 949-50 (D.C.Cir.1998).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C.Cir. Rule 41.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5189 **September Term, 2009**

1:88-cv-00130-HHK

John Davis, **Filed On:** August 26, 2010

Appellant

v.

United States Department of Justice,

Appellee

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5189 **September Term, 2009**

1:88-cv-00130-HHK

John Davis,

Appellant

v.

United States Department of Justice,

Appellee

Filed On: August 26, 2010

BEFORE: Henderson, Tatel, and Griffith, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on August 19, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk